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Criminal Procedure

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Criminal Procedure

Criminal Procedure; death penalty

Military and Veterans Code §1672 (amended); Penal Code §§190, 190.1, 190.2, 190.3 (repealed); §§190, 190.1, 190.2, 190.3, 190.4, 190.5, 190.6 (new); §§37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, 12310 (amended).

SB 155 (Deukmejian); STATS 1977, Ch 316

(Effective August 11, 1977)

Support: California Attorney General; California District Attorneys' Association

Opposition: American Civil Liberties Union; California Public Defenders' Association

Rewrites California's capital punishment law; delineates those crimes for which death may be imposed; establishes special circumstances, the existence of which may subject a defendant to death; requires the sentencing authority to review aggravating and mitigating circumstances before sentencing an offender to death or life imprisonment without the possibility of parole; establishes guidelines by which special circumstances and aggravating and mitigating factors are evaluated.

Chapter 316 is an attempt to bring California law into consonance with recent State and Federal Supreme Court decisions that prescribe certain judicial procedures to be observed in the trial of defendants who may be sentenced to death [*See* CAL. STATS. 1977, c. 316, §26, at —]. The new law endeavors to emend the previous statute's constitutional inadequacies by providing for a consideration of mitigating circumstances [*See* CAL. PENAL CODE §190.3]. Should such circumstances be found to exist, Chapter 316 permits a sentence of life imprisonment without possibility of parole to be imposed as an alternative to a sentence of death [*See* CAL. PENAL CODE §190.3].

Before the enactment of Chapter 316, a defendant found guilty of first degree murder received a mandatory sentence of death whenever the trier of fact established the existence of one or more of the special circumstances enumerated in the prior Section 190.2 of the Penal Code [CAL. STATS. 1973, c. 719, §5, at 1299]. This inflexible standard left the sentencing authority without the opportunity to consider mitigating circumstances and without an option as to the punishment to be imposed; for these reasons the prior capital punishment law was declared unconstitutional by the California Supreme Court in *Rockwell v. Superior Court* [18 Cal. 3d 420, 445, 556 P.2d 1101, 1116, 134 Cal. Rptr. 650, 665 (1976)]. Chapter 316 attempts to rectify

these past deficiencies by instituting, in a trial for murder, a multi-phased process that includes a penalty hearing in which to consider extenuating circumstances [*Compare* CAL. PENAL CODE §§190.1 and 190.3 with CAL. STATS. 1977, c. 316, §26, at —], thus granting to the trier of fact the discretion to impose a sentence of death or life imprisonment without the possibility of parole [CAL. Penal Code §190.3].

Under the new procedure governing trials of capital offenses, the defendant's guilt is first adjudged [CAL. PENAL CODE §190.1(a)]. The trier of fact in a trial of a defendant convicted of treason [CAL. PENAL CODE §37], sabotage resulting in death [*See* CAL. MIL. & VET. CODE §1672(a)], willful perjury resulting in the execution of an innocent person [CAL. PENAL CODE §128], train wrecking or derailling resulting in death [CAL. PENAL CODE §219], or deadly assault by a life prisoner [CAL. PENAL CODE §4500], proceeds directly from the adjudication of his or her guilt to an evaluation of mitigating and aggravating circumstances and the consequent determination of penalty [CAL. PENAL CODE §190.3]. In cases, however, where the defendant is found guilty of *first degree murder*, the trier of fact must then determine if any of the special circumstances charged to the offender exist [CAL. PENAL CODE §190.1(a)].

Evaluation of Special Circumstances

Section 190.2 of the Penal Code outlines the special circumstances that may be asserted against a defendant convicted of first degree murder: (1) the killing was intentional and committed for a valuable consideration; (2) the defendant with lethal intent physically aided or committed the act causing death, and the murder was perpetrated by a destructive device or explosive; (3) the defendant was present during the murder and, with lethal intent, physically aided or committed the act causing death, and the victim was either a peace officer killed in the line of duty or was a witness to a crime killed to prevent his or her testimony in a criminal proceeding; (4) the defendant was present during the murder, and with lethal intent, physically aided or committed the act causing death and the murder occurred during the commission or attempted commission of a robbery, kidnapping, rape, lewd or lascivious act on a child, or burglary; (5) the murder involved the infliction of torture, which must be established by proof of the defendant's intent to inflict extreme and prolonged pain; or (6) the defendant was convicted of another murder in the first or second degree in the same trial or in any previous proceeding [CAL. PENAL CODE §190.2]. Chapter 316 defines "physically aided" as conduct constituting an assault or battery upon the victim, or words or conduct ordering, initiating, or coercing the killing of the victim [CAL. PENAL CODE §190.2(d)]. The trier of fact is required to make a special finding that each of the special circumstances charged is true

or untrue, and if reasonable doubt exists as to the truth of any special circumstance, the defendant is entitled to a finding that it is untrue [CAL. PENAL CODE §190.4(a)]. Moreover, if the existence of a special circumstance is dependent upon proof of the commission or attempted commission of a felony listed under Section 190.2(c)(3) of the Penal Code (robbery, kidnapping, rape, burglary, or a lewd act with a child), that felony must be charged and proved as if the defendant were on trial for that offense alone [See CAL. PENAL CODE §190.4(a)].

When a jury as the trier of fact determines the guilt of a defendant charged with first degree murder, it must at the same time determine the validity of the alleged special circumstances by evaluating the evidence presented at the trial [*Compare* CAL. PENAL CODE §190.4(a) *with* CAL. PENAL CODE §190.1(a)]. Whenever the jury fails to reach a unanimous verdict that all of the special circumstances charged are not true and fails to find, by unanimous verdict, that at least one of the alleged special circumstances is true, the jury must be dismissed and a new one impaneled in its place [CAL. PENAL CODE §190.4(a)]. Should this new jury also fail to reach the unanimous verdict that one or more of the circumstances charged is true, it too will be dismissed and the court will sentence the defendant to life imprisonment with the possibility of parole [See CAL. PENAL CODE §190.4(a)]. If, however, the defendant pleads guilty or is convicted by the court sitting without a jury, a jury must be impaneled to determine the truth of the special circumstances, unless waived by both the defendant and the prosecution [CAL. PENAL CODE §190.4(a)]. In this limited situation, the law is unclear as to the procedure to be taken if a jury is impaneled and it fails to clear the defendant of all special circumstances and fails to find one or more of such special circumstances to be true. Since there is no provision for impaneling a second jury, as is the case when the defendant is convicted by a jury, it would appear that the court would be required to sentence the defendant to life imprisonment with the possibility of parole [See CAL. PENAL CODE §190.4(a)].

As noted, Section 190.4(a) requires that the determination of “the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial.” In light of this new limitation, it is not clear by what method the court may educate any newly impaneled jury on the facts of the case in which it must determine the truth of special circumstances. If such a jury is to hear testimony that was originally presented at trial, it is conceivable that this repeated testimony may involve altered language or demeanor on the part of a witness. Since the concept of “evidence” in California includes not only the words but also the demeanor of a witness [See CAL. EVID. CODE §140, CAL. LAW REVISION COMM’N COMMENT], it may consequently be difficult to satisfy the requirement of the

new law that the jury's determination of special circumstances be based upon *evidence* presented at trial. This problem apparently exists when a new jury is impaneled either following a plea of guilty, a *court* determination of guilt in a first-degree murder trial, or failure of the jury that has convicted a defendant of murder to reach consensus on the special circumstances [See CAL. PENAL CODE §190.4(a)].

Apparently, the only *new* evidence that can be considered by the trier of fact in evaluating the special circumstances is information presented at a separate hearing demonstrating that the defendant had previously been found guilty of first or second degree murder [See CAL. PENAL CODE §190.4(a). See generally CAL. PENAL CODE §§190.1(b), 190.2(c)(5)]. For purposes of evaluating this special circumstance, any act committed outside of California, which if committed inside this state would have constituted first or second degree murder, is considered to be first or second degree murder. [Compare CAL. PENAL CODE §190.2(c)(5) with CAL. PENAL CODE §§190.1(b) and 190.4(a)].

This limitation on the consideration of evidence in determining the verity of any alleged special circumstance suggests that the prosecutor must not only prove the elements of first degree murder, but must also present at the guilt adjudication phase of the trial all evidence to be used in determining the existence of a special circumstance [See CAL. PENAL CODE §190.4(a)]. Much of the information that is relevant in proving special circumstances, however, may have little relevance to the question of guilt, and may even be prejudicial to a fair determination of that question [See *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)]. In *Gregg v. Georgia* [428 U.S. 153 (1976)], the United States Supreme Court recognized that "[t]rial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt" [*Id.* at 191 (quoting MODEL PENAL CODE §201.6, Comment 5 (Tent. Draft No. 9, 1959))]. Thus, it is conceivable that a court, at the insistence of counsel for the defense, may refuse to admit evidence that is immaterial or prejudicial to the issue of guilt or innocence, but is crucial for proof of the validity of the alleged special circumstances [See CAL. PENAL CODE §190.4(a)]. For example, one of the special circumstances listed in Section 190.2 that may subject a defendant to death is the killing of a peace officer engaged in the performance of his or her duty [CAL. PENAL CODE §190.2(c)(1)]. In order to satisfy the requirement of this special circumstance, the defendant must have known or should have known that the victim was an officer [CAL. PENAL CODE §190.2(c)(1)]. Evidence of such knowledge, therefore, is crucial in determining the validity of the special circumstance [Compare CAL. PENAL CODE §190.2(c)(1) with CAL. PENAL CODE §190.4(a)], but is arguably immaterial in proving

the defendant guilty of murder and may consequently be inadmissible at trial [See CAL. PENAL CODE §190.4(a)]. Under the new capital punishment law, however, unless evidence of the defendant's knowledge of the victim's identity is introduced at trial, Section 190.4 precludes the use of such proof to evaluate the special circumstance [See CAL. PENAL CODE §190.4(a)]. This dilemma between the rules regulating the admissibility of evidence and the need for information with which to appraise the verity of any charged special circumstance might be resolved by an amendment to Section 190.4 that provides for the introduction of additional evidence during the special circumstance phase of the proceeding [See CAL. PENAL CODE §190.4(a)]. Until the advent of such an amendment, however, prosecutors may arguably avoid this predicament by not only charging the defendant with murder but also with a lesser offense such as assault on a peace officer. Through the use of such tactics, evidence demonstrating that the defendant knew or should have known that his or her victim was a law enforcement officer would probably be admissible since it not only supports the existence of a special circumstance, but also tends to prove that the defendant is guilty of one of the crimes for which he or she is currently on trial.

Determination of Penalty

A separate penalty hearing is convened to determine whether a sentence of death or life imprisonment without parole shall be imposed upon a defendant whenever he or she is convicted of first degree murder *and* the trier of fact is convinced beyond a reasonable doubt that at least one of the asserted special circumstances is true [CAL. PENAL CODE §190.4(a). *See generally* CAL. PENAL CODE §190.3], *or* when the defendant is found guilty of treason, sabotage resulting in death, willful perjury resulting in the execution of an innocent person, train wrecking or derailing, or deadly assault by a life prisoner [See CAL. PENAL CODE §190.3]. During this penalty hearing, the trier of fact is to take into account mitigating and aggravating circumstances that may be presented by either the prosecution or the defense, which include: the nature and circumstances of the crime for which the defendant presently stands convicted; whether the defendant engaged in prior violent criminal activity; whether the crime occurred while the defendant was mentally or emotionally disturbed; whether the victim participated in or consented to the homicidal act; whether the defendant reasonably believed there was moral justification for his or her conduct; whether the defendant acted under duress or under the "substantial domination" of a third person; whether mental disease or intoxication impaired the defendant's capacity to appreciate the criminality of his or her conduct or to conform his or her behavior to the requirements of the law; the defendant's age at the time of the offense, as well as the defendant's character and physical condition; and whether the defendant was an accomplice whose

participation in the crime was relatively minor [See CAL. PENAL CODE §190.3]. The trier of fact must also consider any other factors that may "extenuate" the gravity of the crime [CAL. PENAL CODE §190.3(j)].

It is significant that Section 190.3 not only focuses the sentencing authority's attention upon the defendant's appreciation of the criminality of his or her conduct but also upon the offender's capacity to conform to the requirements of the law [See CAL. PENAL CODE §190.3(g)]. This two-fold impaired capacity test is similar to the test embodied in Section 4.01(1) of the Model Penal Code [Compare CAL. PENAL CODE §190.3(g) with MODEL PENAL CODE §4.01(1) (Proposed Official Draft, 1962)] and is an important departure from the "M'Naughton test," which in a liberalized form, has been traditionally applied in California [Compare CAL. PENAL CODE §190.3(g) with *People v. Wolf*, 61 Cal. 2d 795, 799-803, 394 P.2d 959, 961-63, 40 Cal. Rptr. 271, 273-75 (1964) and *People v. Crosier*, 41 Cal. App. 3d 712, 716, 116 Cal. Rptr. 467, 470-71 (1974)]. A person cannot be convicted for acts committed while insane and "[i]nsanity, under the California M'Naughton test, denotes a mental condition which renders a person incapable of knowing or understanding the nature and quality of his act" [*People v. Kelly*, 10 Cal. 3d 565, 574, 516 P.2d 875, 881, 111 Cal. Rptr. 171, 177 (1973)]. Apparently the new capital punishment law requires that both tests, the impaired capacity test and the "M'Naughton test," be applied at different stages of the judicial process [See CAL. PENAL CODE §§190.1(c), 190.3(g)]. If the defendant pleads not guilty by reason of insanity, the trier of fact will, in the absence of further legislative directives, adjudge mental capacity in the special sanity determination proceeding by applying the narrower "M'Naughton test" [Compare CAL. PENAL CODE §190.1(c) with *People v. Crosier*, 41 Cal. App. 3d 712, 716, 116 Cal. Rptr. 467, 470-71 (1974)]. In the penalty hearing, however, the sentencing authority is to apply the impaired capacity test, which is more closely aligned with the Model Penal Code standard, to determine whether the defendant should be sentenced to death or life imprisonment without the possibility of parole [See CAL. PENAL CODE §190.3(g)].

Chapter 316 prohibits evidence revealing prior nonviolent criminal activity from being presented in a penalty hearing [CAL. PENAL CODE §190.3]. Hence, for example, evidence of a prior conviction for forgery, as long as the commission of the offense did not include the use of force, would not be admissible at the penalty hearing [See CAL. PENAL CODE §190.3]. The new law also precludes the introduction of evidence establishing prior criminal activity on the part of the defendant involving an offense for which he or she was later tried and acquitted [CAL. PENAL CODE §190.3]. Nevertheless, evidence of prior criminal activity that included the use or attempted use of force, for which the defendant was never convicted, but from which he or she was never officially absolved, is apparently admissible [See CAL.

PENAL CODE §190.3]. This suggests that a record of arrest for any violent crime may be admitted into evidence against the defendant even though charges were later dropped [*See* CAL. PENAL CODE §190.3].

The prosecution ordinarily cannot present evidence of aggravating circumstances unless the defendant receives notice, within a reasonable time prior to the trial, that such evidence will be introduced [CAL. PENAL CODE §190.3]. Evidence of aggravation, however, may be introduced without such notice if it is used in rebuttal of evidence presented by the defendant in mitigation [CAL. PENAL CODE §190.3]. After receiving all relevant evidence, the trier of fact is required to “consider, take into account and be guided by the aggravating and mitigating circumstances” in determining whether the offender’s penalty should be death or life imprisonment without the possibility of parole [CAL. PENAL CODE §190.3].

The new law also requires that the trier of fact at the penalty hearing be a jury unless this right is waived by both the defendant and the prosecution [CAL. PENAL CODE §190.4(b)]. If the jury is unable to reach a unanimous verdict as to the penalty to be exacted, the court shall dismiss the jury and sentence the defendant to life imprisonment without possibility of parole [CAL. PENAL CODE §190.4(b)].

Review

Whenever the trier of fact sentences a defendant to death, the court must assume that a request for modification of the verdict or finding pursuant to Section 1181(7) of the Penal Code has been filed [CAL. PENAL CODE §190.4(e)]. This requires the judge to “review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances” and to make an independent determination of whether the weight of the evidence supports the jury’s findings and verdicts [CAL. PENAL CODE §190.4(e)]. The judge is required to enter the reasons for his or her findings in the record of the proceedings [*See* CAL. PENAL CODE §190.4(e)]. If the magistrate grants a modification of the verdict, the grant must be reviewed if the people elect to appeal pursuant to Section 1238(a)(6) of the Penal Code [*See* CAL. PENAL CODE §190.4(e)]. If the request for the modification is denied, the denial will be reviewed during the course of the defendant’s automatic appeal to the state supreme court in conformance to Section 1239(b) of the Penal Code [CAL. PENAL CODE §190.4(e)].

Section 190.6 newly added to the Penal Code, dictates that the state supreme court, which has appellate jurisdiction in all cases in which a person has been sentenced to death [CAL. CONST. art. 6, §11], render judgment on this automatic appeal within 150 days of the certification of the record by the court that sentenced the defendant to death. If the supreme court fails to meet this deadline, Chapter 316 requires the chief justice to

state for the record the justification for the delay [CAL. PENAL CODE §190.6]. The new law specifically indicates, however, that such a delay in the appeal process is not a sufficient basis to preclude the ultimate execution of the sentence [CAL. PENAL CODE §190.6].

Evaluation of Sanity

Whenever a defendant pleads not guilty by reason of insanity pursuant to Section 1026 of the Penal Code, the above described procedures, normally employed in the trials of capital offenses, are altered to include a sanity hearing. [*Compare* CAL. PENAL CODE §190.1(c) *with* CAL. PENAL CODE §190.4(c)]. The law specifically directs that the sanity determination be made whenever such a defendant has been convicted of first degree murder and the trier of fact has held that one or more of the alleged special circumstances are true [CAL. PENAL CODE §190.1(c)]. The new law, however, contains no express provision for a sanity determination when the trier of fact absolves this defendant of all special circumstances. Presumably, in the absence of other statutory direction, Section 1026 intervenes, granting such a defendant an evaluation of his or her sanity before a sentence is pronounced. If adjudged sane, this offender apparently is sentenced to life imprisonment with the possibility of parole [*Compare* CAL. PENAL CODE §190.4(a) *with* CAL. PENAL CODE §§1026 *and* 1190]. In the case in which a defendant was convicted by a jury, and that jury fails to reach a unanimous verdict that one or more of the charged special circumstances are true and does not find that all of the charged circumstances are false, it must be dismissed and a new jury impaneled [CAL. PENAL CODE §190.4(a)]. In the event this "new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true," the court is *specifically directed* to impose a sentence of life imprisonment with the possibility of parole [*See* CAL. PENAL CODE §190.4(a)]. The imposition of this sentence immediately upon the second jury's failure to reach unanimity seemingly precludes the advent of a sanity hearing. Thus, if the law is strictly construed, it is conceivable that a defendant who is legally insane may be automatically sentenced to life imprisonment without having his or her sanity judicially evaluated [*See* CAL. PENAL CODE §190.4(a)]. In order to avoid this anomalous, albeit limited, situation and thus guarantee the defendant's right to a sanity hearing, it is likely that the courts will subordinate this particular sentencing directive of Section 190.4(a) to the general sanity and sentencing procedures mandated by Section 1026. Finally, similar to the prior capital punishment law, Chapter 316 provides that if the trier of fact that convicted the defendant of a crime for which he or she may be subjected to the death penalty was a jury, the same jury must consider any plea of not guilty by reason of insanity, the truth of any special circumstances alleged, and the penalty to be applied, unless for good cause shown, the court

discharges the jury in which case a new jury must be impaneled [*Compare* CAL. PENAL CODE §190.4(c) *with* CAL. STATS. 1973, c. 719, §4, at 1298].

General Provisions

Chapter 316 retains provisions of the prior law forbidding a sentence of death from being imposed upon anyone under 18 years of age at the time he or she committed the offense [*Compare* CAL. PENAL CODE §190.5(a) *with* CAL. STATS. 1973, c. 719, §6, at 1300]. Unless otherwise provided, a death sentence may not be imposed upon any principal in a capital crime unless he or she was present during the act causing the victim's death and intentionally either physically aided or personally committed such act [CAL. PENAL CODE §190.5(b)]. Excepted from this general provision are those persons: (1) convicted of violating Penal Code Sections 37 (treason), 128 (procurement by perjury of the execution of an innocent person), 190.2(b) (murder by destructive device or explosive), or 4500 (deadly assault by a life prisoner); (2) convicted of violating Section 1672(a) of the Military and Veterans Code (sabotage resulting in death); or (3) convicted of murder committed pursuant to an agreement defined in Penal Code Section 190.2(a) [*See* CAL. PENAL CODE §190.5(b)].

Chapter 316 will have several other miscellaneous effects. The new law amends Section 1672(a) of the Military and Veterans Code and Sections 37, 128, and 219 of the Penal Code so as to generally grant the trier of fact the alternative of sentencing violators to death or life imprisonment without possibility of parole. As amended, Section 209 of the Penal Code reduces from capital punishment to life imprisonment without parole the sentence that may be applied to defendants found guilty of a kidnapping in which the victim suffers death [*Compare* CAL. PENAL CODE §209(a) *with* CAL. STATS. 1976, c. 1139, §136.5, at —]. Prior to the enactment of Chapter 316, Section 1103 of the Penal Code prohibited evidence of any overt act that was not specifically charged from being admitted in a trial for treason [CAL. STATS. 1880, c. 47, §69, at 22]. This prohibition has been relaxed to allow evidence to be presented at the penalty hearing phase of the trial [*Compare* CAL. PENAL CODE §1103 *with* CAL. PENAL CODE §§190.3 and 190.4].

Section 4500 of the Penal Code, dealing with assaults by inmates sentenced to life imprisonment, has been amended not only to provide life imprisonment without parole as an alternative punishment to death, but also to expand the scope of the section by making it a capital offense for an inmate serving a life sentence to fatally assault another inmate [CAL. PENAL CODE §4500]. Furthermore, under the old law, a defendant who willfully and maliciously ignited an explosive causing mayhem or great bodily injury could be sentenced to death [CAL. STATS. 1970, c. 771, §9, at 1458]. Chapter 316 revises Section 12310 of the Penal Code to provide for a

maximum sentence of life imprisonment without the possibility of parole in cases in which death is proximately caused by the defendant's act; if mayhem or great bodily injury is the result, the defendant is to receive a sentence of life imprisonment with the possibility of parole.

Additionally, Section 23 of Chapter 316 declares that the discovery of an invalid clause or phrase in any of the new and amended provisions will not affect the validity of the remainder of the law [See CAL. STATS. 1977, c. 316, §23, at —]. If for any reason the provisions of Chapter 316 governing the imposition of sentences of death or life imprisonment without possibility of parole are abrogated by the courts, then offenders will receive the next lowest penalty that is still in force [See CAL. STATS. 1977, c. 316, §24, at —]. For example, if the death penalty is held unconstitutional, a defendant who was sentenced to death will be resentenced to life imprisonment without the possibility of parole, or if that penalty is also invalidated, to life imprisonment with parole [See CAL. STATS. 1977, c. 316, §24, at —]. Thus, California's new capital punishment procedure not only mandates that mitigating and aggravating circumstances be considered in determining a defendant's punishment, but also seeks to establish clear and objective guidelines by which sentencing authorities can fairly and consistently evaluate such circumstances.

COMMENT

If Chapter 316 is to survive the inevitable constitutional challenge it must rectify the procedural deficiencies noted in the prior law by the California Supreme Court in *Rockwell* and satisfy the requirements established by the United States Supreme Court in *Furman v. Georgia* [408 U.S. 238 (1972)]. It must also follow the additional guidelines established in the more recent cases of *Gregg v. Georgia* [428 U.S. 153 (1976)], *Proffitt v. Florida* [428 U.S. 242 (1976)], *Jurek v. Texas* [428 U.S. 262 (1976)], *Woodson v. North Carolina* [428 U.S. 280 (1976)], and *Roberts v. Louisiana* [428 U.S. 325 (1976)].

In *Furman* the United States Supreme Court held that the mandatory imposition and carrying out of the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments of the United States Constitution [See 408 U.S. 238, 239-40 (1972) (per curiam)]. Thus, "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action . . ." [Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion)].

In response to this constitutional mandate the California State Legislature enacted a mandatory death penalty statute in 1973 that sought to prevent the wanton application of death by removing all discretionary powers from sentencing authorities in capital cases [*See Rockwell v. Superior Court*, 18 Cal. 3d 420, 446, 556 P.2d 1101, 1117, 134 Cal. Rptr. 650, 666 (1976) (concurring opinion)]. *See generally* CAL. STATS. 1973, c. 719, §§4, 5, at 1298-99]. Subsequently, in 1976 the United States Supreme Court upheld the discretionary capital punishment statutes of Georgia, Florida, and Texas [*Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276-77 (1976) (plurality opinion)], while striking down the mandatory death statutes of North Carolina and Louisiana [*Woodson v. North Carolina*, 428 U.S. 280, 301 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976)]. In connection with these cases, the Court noted that a sentence of death was not “cruel and unusual punishment” per se [*Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion)]. The Court reasoned, however, that mandating the imposition of death regardless of mitigating circumstances violates society’s evolving standard of decency respecting punishment and exacerbates the problem of arbitrary application of sentences of death [*See Woodson v. North Carolina*, 428 U.S. 280, 293-303 (1976) (plurality opinion)]. Additionally, the Court noted that in jurisdictions which have enacted mandatory statutes, many juries hearing evidence establishing the elements of a capital crime will nevertheless find a defendant guilty of a lesser offense if they believe death is too severe a punishment under the particular circumstances of the crime [*Compare Woodson v. North Carolina*, 428 U.S. 302-03 (1976) (plurality opinion) *with Roberts v. Louisiana*, 428 U.S. 334-35 (1976) (plurality opinion)]. Consequently, under mandatory death penalty statutes, caprice is enhanced by resting the determination of sentence upon a particular jury’s willingness to disregard the law [*See Roberts v. Louisiana*, 428 U.S. 334-35 (1976) (plurality opinion)].

Upon an evaluation of the recent United States Supreme Court decisions on the subject, the California Supreme Court in *Rockwell* held that the provisions of the state’s previous capital punishment statute, which were similar to those of North Carolina and Louisiana statutes [18 Cal. 3d at 443, 556 P.2d at 1116, 134 Cal. Rptr. at 665], violated the eighth and fourteenth amendments since: death was mandatorily imposed for certain categories of first degree murder; the sentencing authority had no opportunity to consider mitigating circumstances before determining a penalty; and the law afforded no detailed guidelines to help the sentencing authority determine whether death was an appropriate punishment [*See* 18 Cal. 3d at 439, 556 P.2d at 1112, 134 Cal. Rptr. at 661].

While *Furman* declared that caprice in capital sentencing, created by unrestrained discretion, would not be tolerated, the Court in *Gregg*, *Proffitt*, and *Jurek* clarified the means by which it hoped that such caprice could be ameliorated. For example, in *Gregg* Justices Stewart, Powell, and Stevens observed that discretion could be “controlled by clear and objective standards” [428 U.S. at 198 (plurality opinion)] that focused the jury’s attention on the “specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons?” [*Id.* at 197 (plurality opinion)]. Additionally, these jurists noted that the Georgia statute properly directed the jury’s attention at the offender’s characteristics: “Does he have a record of prior convictions for capital offenses? Are there any special circumstances about this defendant that mitigate against imposing capital punishment (*e.g.*, his youth, the extent of his or her cooperation with the police, his emotional state at the time of the crime)” [*Id.* (plurality opinion)]. Chapter 316 appears to provide sentencing standards similar to those suggested in *Gregg*, *Proffitt*, and *Jurek*. Section 190.2 of the Penal Code requires the jury to evaluate the specific facts of the crime to determine the existence of special circumstances, while Section 190.3 establishes clear and objective guidelines with which to assess mitigating circumstances. Consequently, these provisions will probably be found to conform to the constitutional standards most recently set forth by the United States Supreme Court.

The most probable source of constitutional challenge to California’s new death penalty law may be the failure of Chapter 316 to mandate proportional review of death sentences by a state appellate court. “Proportionality review” provides assurance that the imposition of death in any given case is not disproportionate to sentences handed down in other cases of similar circumstances [*See Proffitt v. Florida*, 428 U.S. 242, 250-51 (1976) (plurality opinion)]. In striking down the death penalty statutes of North Carolina and Louisiana, the United State Supreme Court observed that neither state’s law provided for a meaningful appellate review that would limit the arbitrary and capricious imposition of death [*See Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (plurality opinion)]. “Proportionality review,” as suggested by Justices Stewart, Powell, and Stevens in *Gregg*, “substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury” [428 U.S. at 206 (plurality opinion)]. The Court noted that the Georgia statute, which it upheld, requires “that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary

factor, whether the evidence supports the findings of a statutory aggravating circumstance, and “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant” [Id. at 204 (plurality opinion) (quoting GA. CODE ANN. §27-2537(c)(3) (Supp. 1975))]. Thus, under Georgia law the state supreme court will not affirm a death sentence “ ‘if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts . . . ’ ” [Id. at 205 (plurality opinion) (quoting *Coley v. State*, 231 Ga. 829, 831, 204 S.E.2d 612, 616 (1974))]. In *Proffitt*, the Court observed that under the Florida law the state supreme court reviews a sentence of death “ ‘in light of . . . other decisions and determine[s] whether or not the punishment is too great’ ” [428 U.S. at 251 (plurality opinion)]. In *Jurek*, Justice Stewart quoted the Texas Court of Criminal Appeals when it claimed that the Texas death penalty law insures that a sentence of death “ ‘will only be imposed for the same type of offenses which occur [sic] under the same type of circumstances’ ” [428 U.S. at 270 (plurality opinion) (quoting *Jurek v. Texas*, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975))]. The reasoning of the United States Supreme Court in *Woodson* and *Roberts* coupled with the Court’s observations in *Gregg*, *Proffitt*, and *Jurek* to suggest that a capital punishment law that fails to provide for appellate review which insures the proportionality of sentencing may be held unconstitutional, since it may allow death to be imposed arbitrarily [See *Gregg v. Georgia*, 428 U.S. 153, 204-06 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 250-53 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (plurality opinion)].

Whether California’s death penalty law allows the state supreme court to provide this type of proportional review is, at best, unclear. The language of this new law concerning appellate review is similar to that of the Florida and Texas laws, which were deemed constitutionally sufficient [*Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (plurality opinion)], in that all three of these laws mandate an automatic review of cases in which the defendant has been sentenced to death [*Compare* CAL. PENAL CODE §§190.4(e) and 1239 with FLA. STAT. ANN. §921.141(4)(West) and TEX. CRIM. PRO. CODE ANN. §37.071 (Vernon)]. The Supreme Courts of Florida and Texas, however, have construed their review functions broadly, allowing them to modify a trial court’s sentence of death whenever it is excessive or disproportionate [See *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1976); *Jurek v. Texas*, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975)]. For example, the Florida Supreme Court interprets its review function in a manner that allows that court to review cases in which a defendant is sentenced to death “in light of

. . . other [cases involving similar circumstances] and determine whether or not the punishment is too great” [State v. Dixon, 283 So. 2d 1, 10 (Fla. 1976)]. In contrast, the California Supreme Court has historically construed its review functions narrowly, limiting its evaluation to questions of law involving the trial court’s proceedings [See People v. Mooney, 176 Cal. 105, 107, 167 P. 696, 696 (1917) (construing CAL. CONST. art. VI, §4, repealed Nov. 8, 1966). Compare CAL. PENAL CODE §1239 with CAL. PENAL CODE §1259]. Chapter 316 contains no language that expressly alters this narrow construction and on numerous occasions the state supreme court has specifically denied that it has the authority to substitute its judgment as to the choice of penalty for that of the trier of fact [*E.g.*, *In re Andersen*, 69 Cal. 2d 613, 623, 447 P.2d 117, 124, 73 Cal. Rptr. 21, 28 (1968); *People v. Lookadoo*, 66 Cal. 2d 307, 327, 425 P.2d 208, 221, 57 Cal. Rptr. 608, 621 (1967); *People v. Howk*, 56 Cal. 2d 687, 699-701, 365 P.2d 426, 433-34, 16 Cal. Rptr. 370, 377-78 (1961)]. Moreover, since the appellate court cannot generally look beyond the trial court record [*People v. Mooney*, 176 Cal. 105, 107, 167 P. 696, 696 (1917) (construing CAL. CONST art. VI, §4, repealed Nov. 8, 1966); Comment, *Post-Conviction Remedies in California Death Penalty Cases*, 11 STAN. L. REV. 94, 103 & n.20 (1958-59). Compare CAL. PENAL CODE §1239 with CAL. PENAL CODE §1259], the ability to compare a sentence of death imposed in a particular case with that of sentences meted out in like cases may be severely limited. Yet, despite its historically narrow construction of judicial review, the California Supreme Court noted in *Rockwell*, albeit in dicta, that “[t]he automatic appeal from a judgment imposing death (§1239) does offer the prompt review by a court of statewide jurisdiction which the [United States Supreme Court] found to be an additional ‘check against the random or arbitrary imposition of the death penalty’ in *Gregg v. Georgia* . . .” [18 Cal. 3d 420, 441, 556 P.2d 1101, 1113, 134 Cal. Rptr. 650, 662 (1976)]. This statement may signal the state court’s willingness to broaden the scope of its review and thus, evaluate the proportionality of sentences of death. Unless such a change has in fact occurred, however, it may be persuasively argued on the basis of past construction that the state supreme court will refuse to modify a sentence of death even when it finds that such a punishment is disproportionate to sentences in similar cases, in which case there may be sufficient grounds upon which to adjudge the new law unconstitutional.

If the California Supreme Court expands its review function, it must be further ascertained whether the record of the trial court affords the reviewing body a basis for the “meaningful” review suggested by the 1976 United States Supreme Court decisions. California’s appellate review procedure, which is nearly identical to that of Florida [Compare CAL. PENAL CODE §§190.4(e) and 1239 with FLA. STAT. ANN. §921.141(3)-(4)(West)],

requires the trial judge to make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts, and to state on the record the reasons for his or her findings [CAL. PENAL CODE §190.4(e)]. Since this procedure affords this state's reviewing court at least as much information as is made available to the reviewing court in Florida, it appears that "meaningful appellate review of each . . . sentence is made possible" [See *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (plurality opinion)].

Finally, the possibility that prosecuting authorities may attempt to apply Chapter 316 retroactively cannot be dismissed, especially in light of the recent United States Supreme Court's holding in *Dobbert v. Florida* [97 S. Ct. 2290 (1977)]. In *Dobbert*, the defendant was convicted of murdering his two children, one in December of 1971, and the other between January and April of 1972 [*Id.* at 2295]. At the time of the commission of both murders, Florida law provided that a defendant found guilty of a capital felony was to be sentenced to death unless the jury's verdict included a recommendation of mercy [*Id.*]. In July of 1972 the Florida Supreme Court held that this procedure was inconsistent with the requirements mandated by the United States Supreme Court in *Furman* [Donaldson v. Sacks, 265 So. 2d 499, 501 (Fla. 1972)]; later that year Florida enacted a new capital punishment procedure that, in 1976, was upheld by the United States Supreme Court in *Proffitt* [97 S.Ct. at 2296. See generally *Proffitt v. Florida*, 428 U.S. 242 (1976)]. Although these murders were committed while the prior capital punishment law was still in force, it was under the amended procedure that *Dobbert* was sentenced to death [See 97 S.Ct. at 2295-97]. Defendant appealed to the United States Supreme Court, claiming, *inter alia*, that this sentence violated the constitutional proscription against ex post facto laws [*Id.* at 2297]. In a six to three decision the Court affirmed the judgment of the Florida Supreme Court, noting not only that "the inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed" [*Id.* at 2298 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896))], but also reasoning that "even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*" [97 S.Ct. at 2298]. Encouraged by this holding, California prosecutors may seek to apply the procedural amendments of Chapter 316 to defendants who, prior to the California Supreme Court decision in *Rockwell*, committed capital felonies.

In *Gregg*, Justice Stewart explained: "We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system construed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis . . ." [428 U.S. at 194]. Thus, the success

or failure of the new law in constructing a capital punishment statute consonant with recent judicial guidelines must await determination by the higher court and cannot be complacently predicted.

See Generally:

- 1) 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 321 (death penalty) (1974).

Criminal Procedure; investigation and presentation funds in capital cases

Penal Code §987.9 (new).

AB 938 (Goggin); STATS 1977, Ch 1048

(Effective September 24, 1977)

Support: California Attorneys for Criminal Justice; State of California Public Defender

Chapter 1048 complements the recently enacted capital punishment statute by assuring the availability of adequate funds for the investigation, preparation, and presentation of a defendant's case in the trial of a capital crime [CAL. PENAL CODE §987.9]. The new law allows an indigent defendant charged with a capital offense to solicit the court for funds with which to pay investigators, experts, and others for assisting in the preparation and presentation of his or her defense [CAL. PENAL CODE §987.9]. Although not specifically defined by Chapter 1048, an indigent apparently is a defendant for whom counsel has been appointed by the court, and who is unable to pay the costs for such counsel as determined by Penal Code Section 987.8 [Compare CAL. PENAL CODE §987.9 with CAL. PENAL CODE §§987.2, 987.3 and 987.8]. Defendant's counsel must apply for such aid by an affidavit that specifies that the requested amount is reasonably necessary for the client's defense [CAL. PENAL CODE §987.9]. The reasonableness of the requested assistance is then evaluated at an *in camera* hearing, by a judge of the court other than the judge presiding over the defendant's trial. The court's evaluation must be guided by the need to provide the accused with a complete defense [CAL. PENAL CODE §987.9]. Apparently, Section 987.9 of the Penal Code only requires defense counsel to specify to the reasonableness of the total funds requested and does not demand an itemization to guide the judge in determining whether the amount solicited is reasonable [CAL. PENAL CODE §987.9]. Funds allotted the defendant by the court are distributed to his or her counsel, who upon termination of the judicial proceedings, must supply the court with an accounting of all moneys received pursuant to this new law [CAL. PENAL CODE §987.9]. Finally,

Chapter 1048 provides that any request for, or the contents of any application for funds under this new law are confidential [CAL. PENAL CODE §987.9]. Thus, Chapter 1048, an apparent companion measure to the new capital punishment law [CAL. STATS. 1977, c. 1048, §§2, 4, at —, —], makes funds available for the investigation, preparation, and presentation of a defendant's case in a trial in which he or she is subject to the death penalty.

Criminal Procedure; preliminary hearings, trials

Penal Code §§859b, 1043, 1059 (amended).

AB 513 (Cordova); STATS 1977, Ch 1152

Support: California Attorney General; California Peace Officers' Association

Chapter 1152 encourages the prompt disposition of criminal cases by extending to the people the defendant's right to a timely preliminary hearing [See CAL. PENAL CODE §859b], and by restricting the granting of continuances [See CAL. PENAL CODE §1050]. The new law also prescribes the policies to be observed concerning the presence of the defendant at trial [See CAL. PENAL CODE §1043].

Prior to the enactment of Chapter 1152, Section 859b of the Penal Code granted defendants in custody the right to a preliminary hearing within ten court days of their plea or arraignment [CAL. STATS. 1970, c. 1371, §1, at 2537]. The new law apparently extends this privilege to all defendants, in or out of custody, and awards reciprocal rights to the people [See CAL. PENAL CODE §859b]. Accordingly, the preliminary examination is required to occur within ten court days unless both the defense and the prosecution waive this privilege or good cause for a continuance is found pursuant to Section 1050 of the Penal Code [CAL. PENAL CODE §859b]. No circumstance, however, will justify a continuance beyond ten court days if the defendant is in custody at the time of the plea or arraignment and he or she does not personally waive the right to a prompt preliminary examination [CAL. PENAL CODE §859b]. In order to allow the district attorney and the defendant sufficient time to prepare for the examination the magistrate must allow at least two court days between the arraignment and the preliminary hearing [See CAL. PENAL CODE §859b].

Prior to August 11, 1977, Section 1050 of the Penal Code allowed continuances when they served the ends of justice [See CAL. STATS. 1959, c. 1693, §2, at 4692]. With the override of the Governor's veto of the capital punishment legislation, Section 1050 was effectively amended to grant to the people and a defendant, *inter alia*, "reciprocal rights and

interests in a speedy trial or other disposition" [CAL. STATS. 1977, c. 316, §18, at — (effective August 11, 1977)]. Chapter 1152 further amends this section to now limit the granting of continuances to those cases evidencing "good cause," and extends to both the people and the defendant "the right to an expeditious disposition" of a criminal case [CAL. PENAL CODE §1050]. Thus, for a limited time the prosecution in a criminal case was expressly granted the statutory right to a speedy trial. With the enactment of Chapter 1152, however, it is now arguable that the legislature has limited this right to guarantee the people only an expeditious disposition of such cases and has not intended to expressly grant the reciprocal rights to a speedy trial [*Compare* CAL. PENAL CODE §1050 *with* CAL. STATS. 1977, c. 316, §18, at —]. On the other hand, it is arguably supported by dicta in one recent United States Supreme Court decision that the sixth amendment guarantee of a speedy trial also protects a public and societal interest in such a speedy trial [*See* *Barker v. Wingo*, 407 U.S. 514, 519 (1972)].

Though never expressly defined by Section 1050, "good cause" is to be demonstrated in a memorandum and supporting affidavits or declarations detailing the reasons for the deferment; this memorandum is to be filed within two court days of the hearing that is to be postponed [CAL. PENAL CODE §1050]. If granted, the continuance is limited to the length of time shown to be necessary at the hearing on the motion [CAL. PENAL CODE §1050]. Moreover, whenever a continuance is granted those facts demonstrating the need for a deferment must be entered upon the minutes of the court [CAL. PENAL CODE §1050]. These amendments to Section 1050 appear to be motivated by the legislature's desire to ameliorate the congestion of California criminal courts and the resulting adverse consequences suffered by the state and the defendant [*See* CAL. PENAL CODE §1050].

Chapter 1152 also amends Section 1053 of the Penal Code to require the courts to proceed with the trial of one charged with a misdemeanor if, pursuant to Penal Code Section 977(a), the defendant has authorized counsel to proceed in his or her absence, unless there is good cause shown for a continuance [CAL. PENAL CODE §1043(e)]. If the defendant fails to provide such authorization and yet is absent at the time set for the trial or at any time during the course of the trial, the court may, as under the prior law: (1) continue the matter; (2) order bail forfeited or revoke the defendant's release on his or her own recognizance; (3) issue a bench warrant; or (4) proceed with the trial if the court determines that the accused, though cognizant that the trial is being held, is nevertheless voluntarily absent [CAL. PENAL CODE §1043]. The new law apparently makes no revision to the rules concerning the presence at trial of defendants charged with felonies [*See* CAL. PENAL CODE §1043(a), (b), (c), (d)]. Thus, Chapter 1152 awards reciprocal rights in a timely preliminary hearing to the people as well as to the defendant,

attempts to restrict the granting of continuances, and amends the rules governing court appearances in misdemeanor cases.

See Generally:

- 1) B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial*, §306 (right to speedy trial) (Supp. 1975).

Criminal Procedure; career criminals

Penal Code Chapter 2.3 (commencing with §999b) (new).

SB 683 (Deukmejian); STATS 1977, Ch 1151

Support: California Peace Officers' Association; California Police Chiefs Association

The enactment of Chapter 1151 is the legislative response to findings that a disproportionate percentage of felonies are committed by a handful of repeat offenders [CAL. PENAL CODE §999b]. The new law seeks to focus prosecutorial effort upon such "career criminals" by offering financial incentives and technical assistance to counties that establish Career Criminal Prosecution Units [CAL. PENAL CODE §999c].

In 1975 the Law Enforcement Assistance Administration sponsored experimental career criminal units in 11 jurisdictions and by December of 1976 the number of these federally sponsored units had expanded to 20, including programs operating in San Diego and San Francisco [NATIONAL LEGAL DATA CENTER, INC., CAREER CRIMINAL PROGRAM OVERVIEW 4 (1976) (copy on file at the *Pacific Law Journal*)]. A preliminary evaluation of these habitual offender units discloses impressive results. A survey of approximately two thousand defendants processed under career criminal programs revealed that, on the average, habitual offender jurisdictions have a 94 percent conviction rate [*Id.* at 17]. Moreover, 89 percent of these convictions were for the most serious offense with which the defendant was originally charged [*Id.* at 17]. By contrast, in 1974, Los Angeles, a non-career criminal jurisdiction, convicted only 29 percent of all defendants for the most serious offense charged [*Id.* at 17]. Another impressive result of the career criminal units is the number of convicted felons sentenced to a term of imprisonment. In 1973, in Los Angeles County only 12 percent of the offenders convicted of burglary who had prior felony convictions were sentenced to state prison [*Id.* at 18]. Under habitual offender programs 93 percent of the offenders with prior felony convictions were sentenced to prison [*Id.* at 18]. Even more impressive than these figures is the impact of habitual offender programs on the commission of serious crimes. Statistics from the first nine months of 1976 reveal that 9 of the 11 original career

criminal jurisdictions achieved an aggregate robbery reduction 73 percent higher than the national urban average [*Id.* at 19].

Chapter 1151 establishes in the Office of Criminal Justice Planning a program of financial and technical assistance to be awarded to counties that create career criminal prosecution units in substantial compliance with the guidelines detailed in this new law [CAL. PENAL CODE §999c(a)-(b)]. Section 999d of the Penal Code requires habitual offender units that seek state aid to adopt programs of enhanced prosecution, including: vertical prosecutorial representation “whereby the prosecutor who makes the initial filing or appearance in a career criminal case will handle all subsequent court appearances on that particular case through its conclusion” [NATIONAL LEGAL DATA CENTER, INC., CAREER CRIMINAL PROGRAM OVERVIEW 7-8 (1976) (copy on file at the *Pacific Law Journal*)]; assignment of highly qualified investigators and prosecutors to career criminal cases; and significant reduction of caseloads for investigators and prosecutors assigned to habitual offender cases.

Subject to reasonable prosecutorial discretion, Chapter 1151 mandates that career criminal units seek a plea of guilty or a conviction on the most serious crime charged against the defendant [CAL. PENAL CODE §999f(a)]. Moreover, prosecutors are not only required to resist the pretrial release of a charged defendant meeting career criminal selection criteria [CAL. PENAL CODE §999f(b). *See generally* CAL. PENAL CODE §999e(a)], but also to make all reasonable efforts to reduce the time between arrest and the disposition of a charge against such a defendant [CAL. PENAL CODE §999f(d)]. Prosecuting authorities must also refuse to accept any negotiated plea that: (1) permits a defendant to plead guilty or nolo contendere to any offense other than the most serious crime with which he or she was originally charged; (2) prohibits the prosecution from opposing the defendant's request for a specified sentence, below the maximum allowable punishment; or (3) establishes a specific sentence below the maximum punishment as the appropriate disposition of the case [CAL. PENAL CODE §999f(e)]. Moreover, the prosecutor is to make all reasonable efforts to persuade the court to impose the most severe penalty provided by law upon offenders convicted under career criminal programs [CAL. PENAL CODE §999f(c)]. Section 999g allows the prosecutor to digress from these guidelines whenever the evidence fails to warrant prosecution for the most serious crime charged; whenever prosecution for the most serious offense would not increase the penalty; whenever prosecution for a lesser offense would enhance the successful prosecution of other felony cases; or whenever extraordinary circumstances demand the use of different policies in order to promote the general purposes of the new law [CAL. PENAL CODE §999g]. The exercise of such prosecutorial discretion must be guided by considera-

tions of the offender's character and background as well as by the number and seriousness of the offense(s) with which he is charged [CAL. PENAL CODE §999e(c)].

In order to be the subject of a career criminal prosecution a defendant must not only be charged with the commission or attempted commission of a robbery, burglary, arson, grand theft, grand theft auto, receiving stolen property, or any criminal act relating to controlled substances in violation of Section 11351 or 11352 of the Health and Safety Code, but the defendant must also: (1) be contemporaneously prosecuted for three or more separate offenses not arising out of the same transaction that involve one of the above mentioned crimes; (2) have been convicted in the preceeding ten years of at least one count of robbery while using a dangerous weapon, burglary of the first degree, arson, rape, sodomy or oral copulation committed with force, lewd or lascivious conduct committed upon a child, kidnapping under Section 209 of the Penal Code, or murder; or (3) have been convicted at least twice in the preceeding ten years of grand theft, grand theft auto, receiving stolen property, robbery without the use of a dangerous weapon, second degree burglary, kidnapping under Section 207 of the Penal Code, assault with a deadly weapon, or any act relating to controlled substances in violation of Section 11351 or 11352 of the Health and Safety Code [CAL. PENAL CODE §999e]. Chapter 1151 explains that the ten year period specified in the new law is to be exclusive of any time the defendant has served in state prison [CAL. PENAL CODE §999e(a)]. The words "state prison" are of significance in this provision, for they apparently create a loophole in the law by allowing an offender who has just been released from a ten year or longer term in a federal jurisdiction to commit a crime but not be subject to the enhanced prosecutorial program established by Chapter 1151 [See CAL. PENAL CODE §999e(a)]. Moreover, it is noteworthy that a defendant indicted for rape will not be the subject of a career criminal prosecution under this new law since that crime was excluded from the list of felonies for which enhanced prosecutorial techniques will be applied [See CAL. PENAL CODE §999e(a)]. Chapter 1151 also provides that the characterization of a defendant as a "career criminal" may not be communicated to the trier of fact [CAL. PENAL CODE §999h].

If criminal statistics demonstrate that any of the previously listed felonies present a particularly pressing problem in the county, Section 999e(b) permits a district attorney to limit the prosecutorial efforts of his or her unit to defendants indicted for those offenses. Furthermore, the executive director of the State Office of Criminal Justice Planning is required to annually prepare an evaluation of the habitual offender program and its results [CAL. PENAL CODE §999c(e)]. This evaluation, which will be submitted to the legislature, is to be compiled from information gathered through

those county career criminal units receiving state funding [CAL. PENAL CODE §999c(e)]. Finally, the provisions of Chapter 1151 are operative only until January 1, 1982 [CAL. STATS. 1977, c. 1151, §3, at —].

The impressive results of existing career criminal units undoubtedly make the adoption of enhanced prosecutorial techniques an attractive proposal to district attorneys faced with a burgeoning crime rate. Thus, the offer of state financial and technical assistance made by Chapter 1151 may make the proposal as economically feasible as it is attractive to many California communities that might otherwise be unable to fund such projects.

Criminal Procedure; evidence—rape prosecution

Evidence Code §352.1 (new).

SB 56 (Presley); STATS 1977, Ch 34

Support: California Attorney General; California District Attorneys' Association; California Peace Officers' Association

Section 352.1 has been added to the Evidence Code by Chapter 34 apparently to encourage the victims of certain sex crimes to report these offenses and testify in court without fear of being harrassed by defendants or their associates [Sacramento Bee, April 27, 1977, §A, at 7, col. 1]. This new section permits trial courts to exclude evidence of a victim's address and telephone number in a prosecution for sodomy, oral copulation, or rape if the danger to the victim created by this disclosure outweighs the probative value of the evidence [CAL. EVID. CODE §352.1]. In this manner, Chapter 34 would appear to codify existing judicial practice [*Compare* CAL. EVID. CODE §352.1 *with* *United States v. Saletko*, 452 F.2d 193, 195 (7th Cir. 1971), *cert. denied*, 405 U.S. 1040 (1972) *and* *People v. Benjamin*, 52 Cal. App. 3d 63, 75, 124 Cal. Rptr. 799, 807 (1975)]. To exclude evidence pursuant to Section 352.1, the district attorney must, prior to any hearing at which the current address and telephone number of the victim may be sought, enter a motion to exclude such evidence and notify the defendant and his or her attorney of such motion. A court may then grant such a motion and order all evidence of the victim's address and telephone number excluded from the hearing in question if it finds that the probative value of such evidence is outweighed by the creation of substantial danger to the victim [CAL. PENAL CODE §352.1].

Although evidence relating to the address and telephone number of victims of specified sex crimes may now be excluded, Section 352.1 makes it clear that this limitation is not meant to abridge a defendant's right to utilize criminal discovery procedures or to discover such information by independent investigation. Consequently, while the address and telephone information may not be disclosed at trial, if the victim is a material witness

for the prosecution, the defendant is not precluded from discovering the information and transmitting it to his or her associates. It is arguable that this provision could undermine the previously stated purpose of this new law, which is to protect the victims of sex crimes from harassment by defendants or their associates. Despite this potential limitation, however, Chapter 34 would appear to provide some protection from harassment to victims of certain sex crimes who report these offenses and testify in court against suspected offenders.

COMMENT

In deciding whether a motion to exclude evidence of a sex crime victim's address and telephone number should be granted, the courts are required to weigh the degree of danger to which such a victim might be exposed by the disclosure of the address and telephone number evidence against the probative value of such information to the defendant [*See* CAL. EVID. CODE §352.1]. The courts in these cases must apparently find that the danger to the victim is actual and not conjectural [*United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *see* *People v. Mascarenas*, 21 Cal. App. 3d 660, 667, 98 Cal. Rptr. 728, 732 (1971)]. It would appear, however, that such a finding may be made, and evidence of a rape victim's address may be properly excluded, even if the prosecution fails to present any evidence to show actual danger to the victim [*McGrath v. Vinzant*, 528 F.2d 681, 683-84 (1st Cir. 1976), *cert. denied*, 96 S. Ct. 2221 (1976)]. The Federal First Circuit Court of Appeals reasoned in *McGrath v. Vinzant* [528 F.2d 681 (1st Cir.), *cert. denied*, 96 S. Ct. 2221 (1976)] that the circumstances of the crime of rape implicitly supported a finding of danger to the victim and supplied the factual basis for making such a claim [*Id.* at 683-84]. Thus, a California court apparently could require a finding of actual danger to the victim before it would exclude address and telephone number information, but the factual basis for such a finding may apparently be inferred from the circumstances of the crime.

Once a court has made a finding that there is actual danger to the victim, it must determine whether this danger outweighs the probative value of the address and telephone number evidence, and, thus, decide whether to exclude or admit this information [*See* CAL. EVID. CODE §352.1]. Generally, courts have found the probative value of address information to be greatest when the right of a defendant to confront witnesses against him or her would be jeopardized by nondisclosure of the evidence [*Alford v. United States*, 282 U.S. 687, 692 (1930)]. In *Alford v. United States* [282 U.S. 687 (1930)], the United States Supreme Court held that the right to cross examine witnesses testifying for the prosecution includes the right to establish the identity of the witness or victim through a name and address

[*Id.* at 692]. In *People v. Bradow* [12 Cal. App. 3d 749, 90 Cal. Rptr. 891 (1970)] a California Appellate Court found that the “credibility of the two opposing witnesses constitutes the fulcrum upon which the determination of the defendant’s guilt or innocence must be balanced,” and required disclosure of the address [*Id.* at 755, 90 Cal. Rptr. at 895]. California case law has further established that evidence of an informant’s address is vital to the determination of a defendant’s case when the informant is the only source of evidence against the defendant [*Eleazer v. Superior Court*, 1 Cal. 3d 847, 851-52, 464 P.2d 42, 44-45, 83 Cal. Rptr. 586, 588-89 (1970); *People v. Garcia*, 67 Cal. 2d 830, 842-43, 434 P.2d 366, 373, 64 Cal. Rptr. 110, 118 (1967); *People v. Mascarenas*, 21 Cal. App. 3d 660, 667, 98 Cal. Rptr. 728, 732-33 (1971)]. Since there are usually only two eyewitnesses in a sex crime case [*People v. Delgado*, 32 Cal. App. 3d 242, 249-50, 108 Cal. Rptr. 399, 405 (1973)], establishing the credibility of the victim as a witness would seem to be crucial to the determination of the case. The United States Supreme Court noted in *Smith v. Illinois* [390 U.S. 129 (1968)] that “when the credibility of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’ through cross-examination must necessarily be to ask the witness who he is and where he lives” [*Id.* at 131]. Additionally, the Court in *Smith* noted that the witness’ name and address can lead to other sources of evidence both in and out of court, and to forbid their disclosure would emasculate the right of cross-examination [*Id.*].

California and federal courts have recognized, however, that a defendant’s constitutional right of confrontation is not absolute [*See Smith v. Illinois*, 390 U.S. 129, 132-33 (1968); *Alford v. United States*, 282 U.S. 687, 694 (1930); *People v. Benjamin*, 52 Cal. App. 3d 63, 75, 124 Cal. Rptr. 799, 807 (1975); *People v. Mardian*, 47 Cal. App. 3d 16, 60, 121 Cal. Rptr. 269, 285 (1975)]. Generally, when the defense has the opportunity to conduct a complete cross-examination that establishes the credibility and identity of the witness without disclosure of the witness’ address, and the prosecution shows that disclosure of the address will endanger the personal safety of the witness, the evidence may be excluded without violating the defendant’s confrontation rights [*United States v. Saletko*, 452 F.2d 193, 195 (7th Cir. 1971), *cert. denied*, 405 U.S. 1040 (1972); *People v. Benjamin*, 52 Cal. App. 3d 63, 75, 124 Cal. Rptr. 799, 807 (1975)]. A witness’ credibility can be established without disclosing an address through a cross-examination as to present and past employment, past criminal records, and duration of residence in the community [*See United States v. Saletko*, 452 F.2d 193 (7th Cir. 1971), *cert. denied*, 405 U.S. 1040 (1972); *People v. Mardian*, 47 Cal. App. 3d 16, 40-41, 121 Cal. Rptr. 269, 285 (1975); *People v. Patejdl*, 35 Cal. App. 3d 936, 943-44, 111 Cal. Rptr. 191, 194-95 (1973)]. Thus, when the victim is a witness in a rape prosecution, unless her

credibility can be established through extrinsic sources without disclosing her current address and telephone number, the probative value of such information would appear to be great.

Thus, Evidence Code Section 352.1 as enacted by Chapter 34, appears to comply with constitutional requirements by allowing a defendant to confront witnesses against him or her and recognizes the limitation on this constitutional right by applying a balancing test to determine if the danger to the victim caused by address disclosure outweighs the defendant's need for the address evidence to challenge the credibility of the victim as a witness against the defense.

See Generally:

- 1) B. WITKIN, CALIFORNIA EVIDENCE, *Introduction of Evidence at Trial* §1198 (right of cross-examination in criminal cases) (2d ed. Supp. 1977).

Criminal Procedure; compensation to victims of crime

Government Code §13969.1 (new); §§13959, 13960, 13961, 13962, 13963, 13964, 13966, 13967, 13968, 13973 (amended); Penal Code §§1203, 1203.1 (amended).

AB 1206 (Gage); STATS 1977, Ch 1123

Support: California Peace Officers' Association; State Board of Control SB 83 (Nejedly); STATS 1977, Ch 521

Support: California District Attorneys' Association; California Peace Officers' Association

SB 725 (Smith); STATS 1977, Ch 1122

SB 1032 (Behr); STATS 1977, Ch 636

Support: California Peace Officers' Association; California Department of Finance; Legislative Analyst; State Board of Control

Establishes mandatory penalty assessments for all felony and misdemeanor convictions; requires presentencing report by probation officer to include recommendation concerning restitution to victim as a condition of probation and requires court to consider such a condition; establishes minimum fine for perpetrators of violent crimes causing injury or death who have ability to pay; provides for discretionary partial compensation to victims; creates procedures for reconsideration of decisions on applications for compensation and for judicial review of such decisions; deletes duties of Attorney General in victim compensation program; enlarges class of persons eligible for compensation.

Legislation enacted in 1977 has significantly altered the law regarding California's program for compensating victims of violent crime by making more persons eligible, by shifting the burden of compensation to convicted

criminals, and by altering procedures for awarding such compensation [*See generally* CAL. GOV'T CODE §§13959-13974]. California has determined that it is in the public interest to compensate victims who, as a direct result of a violent crime, suffer a pecuniary loss from which they cannot recover without serious financial hardship [CAL. GOV'T CODE §13959; *see* CAL. GOV'T CODE 13960]. "Victims" as used in this context refers to persons sustaining physical injury or death as a direct result of a crime of violence [CAL. GOV'T CODE §13960(a)(2)], and those who assume to pay medical or burial expenses incurred as a result of a death directly caused by a violent crime [CAL. GOV'T CODE §13960(a)(3)]. The State Board of Control is charged with approving applications for compensation when the preponderance of evidence shows that the victim has met the criteria established by the legislature for receipt of such aid [*See* CAL. GOV'T CODE §§13960(c), 13964].

Fines and Penalty Assessments

Section 13967 of the Government Code has been amended to make *all* persons convicted of felonies or misdemeanors in California subject to *penalty assessments* of ten and five dollars, respectively, with the proceeds to be used to finance indemnification of victims of violent crimes. Such penalty assessments are to be in addition to any other penalty, including fine or imprisonment, imposed by a court on convicted felons and misdemeanants [*See* CAL. GOV'T CODE §13967]. Although Penal Code Section 19d indicates that unless otherwise provided by law, "all provisions of law relating to misdemeanors shall apply to infractions," the California Legislative Counsel has issued an opinion that persons convicted of infractions are not subject to the penalty assessments provided in Section 13967 [OP. CAL. LEGIS. COUNSEL NO. 15939 (Sept. 23, 1977) Crimes at 1].

Section 13967 retains provisions directing a court to order a person convicted of a violent crime resulting in death or injury to another person to pay a *fine* of up to \$10,000, provided that the convicted person has the ability to pay and that his or her dependents will not be forced to become dependent upon welfare as a result of the fine being paid [*Compare* CAL. STATS. 1973, c. 1144, §2, at 2351 *with* CAL. GOV'T CODE §13967]. Fines or penalty assessments imposed pursuant to Section 13967 are not subject to further assessments authorized by the Penal Code for the Peace Officer Training Fund [CAL. GOV'T CODE §13967. *See generally* CAL. PENAL CODE §13521].

Presentencing Reports

Penal Code Section 1203 has been amended to require probation officers to include in their presentencing report concerning a convicted felon

whether the felon is required to pay a *fine* pursuant to Government Code Section 13967. The report is also to include a recommendation as to whether the court should require restitution to the victim as a condition of probation, and if so, the means and manner of payment [CAL. PENAL CODE §1203(a)]. If the victim has been compensated by the state pursuant to Government Code Sections 13959 through 13974, any restitution is to be made to the State Indemnity Fund [CAL. PENAL CODE §1203(a)]. The presentencing report is to be made available to the court, and the defense and prosecuting attorneys, at least nine days prior to the hearing date set by the court on the matter [CAL. PENAL CODE §1203(a)]. Subsequently, when granting an order of probation, a court must now consider whether restitution shall be required as a condition of probation [*See* CAL. PENAL CODE §1203.1].

Eligibility

California's victim compensation scheme does not extend to certain crimes involving the operation of motor vehicles, aircraft, and water vehicles [CAL. GOV'T CODE §13960(b)] except when the victim's injury is intentionally caused [CAL. GOV'T CODE §13960(b)(1)] or caused by a driver in violation of Vehicle Code Sections 20001 (felony hit and run driving), 23101 (felony-misdemeanor drunk driving), 23102 (misdemeanor drunk driving), or 23106 (felony-misdemeanor driving under the influence of drugs) [CAL. GOV'T CODE §13960(b)(2)]. New legislation, however, creates two additional exceptions to permit compensation for victims of motor vehicle related crimes: (1) persons injured by a driver who was found to be driving under the influence of drugs [CAL. GOV'T CODE §13960(b)(2). *See generally* CAL. VEH. CODE §23105]; and (2) persons injured or killed by a driver of a motor vehicle who is in the act of fleeing the scene of a crime of violence in which he or she knowingly and willingly participated [CAL. GOV'T CODE §13960(b)(3)].

Partial Compensation

Previously existing law made a victim, or the person whose injury or death gave rise to the application, ineligible to receive compensation if: (1) he or she knowingly and willingly participated in the crime giving rise to the injury or death; (2) he or she failed to cooperate in the apprehension and conviction of the criminal committing the crime; (3) the State Board of Compensation found that he or she was involved in events leading up to the crime to an extent that he or she should not recover; or (4) he or she would not suffer serious financial hardship as a result of the injury [CAL. STATS. 1973, c. 1144, §2, at 2348-49]. Section 13964 of the Government Code has been amended to provide that an application may be denied in whole *or in part* if the victim will not suffer serious financial hardship [CAL. GOV'T

CODE §13964(a)(1)] or if the victim's involvement in events leading up to the crime is such that denial would be appropriate [CAL. GOV'T CODE §13964(a)(2)]. "Serious financial hardship," in this context, means that as a result of the injury or death, "the victim suffered pecuniary loss to the extent that he can no longer meet essential obligations or expenses from income or assets available for such purposes, or from indemnification or financial assistance reasonably expected from any other source" [2 CAL. ADM. CODE §649.5]. Thus, the apparent effect of this amendment is to allow partial payment in cases the State Board of Control deems proper, rather than to maintain the more stringent all-or-nothing approach for awarding compensation in specified instances [*Compare* CAL. GOV'T CODE §13964 *with* CAL. STATS. 1973, c. 1144, §2, at 2348-49]. Participation in the crime and failure to cooperate in the apprehension and conviction of the perpetrator, however, continue to be factors that preclude any recovery [CAL. GOV'T CODE §13964(b)(1), (2)].

Procedural Changes

Section 13969.1 has been added to the Government Code to provide that all decisions of the State Board of Control be put in writing [CAL. GOV'T CODE §13969.1(a)] and to establish procedures for the Board's reconsideration and/or judicial review of decisions concerning the disposition of applications for assistance [CAL. GOV'T CODE §13969.1(b), (c)]. The requirement that Board decisions be in writing is expressly intended to ensure reasonable notice to applicants and not to require formal opinions by the Board [CAL. GOV'T CODE §13969.1(a)]. Reconsideration by the Board may be by its own motion or upon request by the applicant or his or her representative, if filed not more than 60 days after mailing or 30 days after personal delivery of the original decision [CAL. GOV'T CODE §13969.1(b)]. Judicial review may be obtained by filing a petition for a writ of mandate in accordance with the provisions of Code of Civil Procedure Section 1088 within 30 days of the personal delivery or 60 days of the mailing of: (1) the Board's original decision from which no request for reconsideration is made [CAL. GOV'T CODE §13969.1(c)(1)]; (2) notice of rejection of request for reconsideration [CAL. GOV'T CODE §13969.1(c)(2)]; or (3) final decision of a reconsidered application [CAL. GOV'T CODE §13969.1(c)(3)].

Provisions have been retained from the former law whereby the state is to be subrogated to the victim's right against the perpetrator of the crime to the extent of the cash payments made to the victim by the state [CAL. GOV'T CODE §13966(a)], and the state is to be entitled to a lien in the manner provided for in Section 688.1 of the Code of Civil Procedure on any recovery made by or on behalf of the victim [CAL. GOV'T CODE §13966(b)]. Section 13966 now also requires that notice be given to the

Board, or the Attorney General if the Board so specifies, if an action for damages is brought by the victim, his or her guardian, personal representative, estate, or survivors against the person or persons liable for the injury or death giving rise to a victim of crime compensation award [CAL. GOV'T CODE §13966(c)]. Notice of the institution of legal proceedings, notice of settlement, and all other notices required to be given to the judgment debtor by Code of Civil Procedure Sections 681 through 723 are to be given by the attorney employed to bring the action or, if no attorney is retained, by the person(s) bringing the action [CAL. GOV'T CODE §13966(c)].

Finally, under prior law, the Attorney General was responsible for various duties related to the compensation of victims of crime program, such as checking the veracity of applications for compensation [CAL. STATS. 1973, c. 1144, §1, at 2348] and establishing standards for duties of local law enforcement agencies in regards to the program [CAL. STATS. 1973, c. 1144, §2, at 2351]. These duties formerly assigned to the Attorney General have been transferred to the State Board of Control or its staff [*Compare, e.g.,* CAL. STATS. 1973, c. 1144, §1, at 2350, 2352 *with* CAL. GOV'T CODE §§13962(c) *and* 13968(c). *But cf.* CAL. GOV'T CODE §13966(c) (notice that victim has instituted action for damages against perpetrator to be given to Attorney General if the Board so specifies)].

In conclusion, the California system for compensating victims of violent crimes has been amended to establish procedures for reconsideration of State Board of Control decisions on applications for assistance, to widen the class of persons eligible to receive such compensation, to allow for partial compensation to victims, and to make other procedural modifications, including the transfer of duties formerly performed by the Attorney General to the Board. In addition, all persons convicted of misdemeanors or felonies must pay penalty assessments, which, along with fines collected from persons convicted of violent crimes, will help finance the victim compensation program.

See Generally:

- 1) 2 CAL. ADM. CODE §§648-649.11 (indemnification of victims of crime).
- 2) B. WITKIN, J. LEAVITT, CALIFORNIA CRIMES, *Introduction* §3A (compensation of victims) (Supp. 1975).
- 3) Geis, Edelhertz, *California's New Crime Victim Compensation Statute*, 11 SAN DIEGO L. REV. 880 (1974).

Criminal Procedure; probation denial

Penal Code §§1203.08, 1203.09 (new);
Welfare and Institutions Code §707 (amended).
SB 370 (Deukmejian); STATS 1977, Ch 1150
Support: California Peace Officers Association

SB 491 (Holmdahl); STATS 1977, Ch 735

Support: California District Attorneys' Association; California Peace Officers' Association

SB 518 (Holmdahl); STATS 1977, Ch 1153

Support: California Correctional Officers' Association; California District Attorneys' Association; California Peace Officers' Association

Under the prior law, a court was only required to deny probation or suspension of sentence to persons who had been convicted of certain violent crimes or narcotic offenses [CAL. PENAL CODE §§1203.06, 1203.07], or who had been convicted two or more times of designated felonies within a ten year period [CAL. STATS. 1976, c. 1135, §1, at —]. Chapters 735, 1150, and 1153 provide additional restrictions on the granting of probation and the suspending of sentences for certain repeat offenders, persons who commit certain felonies against elderly or handicapped individuals, and persons who commit designated felonies while on parole from state prison.

Prior to the enactment of Chapter 735, the law provided that a person convicted of a designated felony who had been convicted two or more times of such a crime within ten years of the present conviction was not to be granted probation or a suspended sentence [CAL. STATS. 1976, c. 1135, §1, at —]. In an apparent effort to further discourage criminal acts by such repeat offenders, Chapter 735 specifies that this ten year "wash out" period now excludes any time during which a person has been confined in state or federal prison [CAL. PENAL CODE §1203.08, *as added*, CAL. STATS. 1977, c. 735, §1, at — (identical section number added by Chapter 1153 of the Statutes of 1977)].

Chapter 1150 adds Penal Code Section 1203.09 to deny probation or the granting of a suspended sentence to persons committing specified violent crimes against persons 60 years of age and older or persons who are blind, paraplegic or quadraplegic. The enumerated crimes committed against these elderly and handicapped individuals for which probation or suspended sentence must be denied are: murder, robbery, kidnapping, burglary of the first degree, rape by force or threat and assault with intent to commit murder or rape [CAL. PENAL CODE §1203.09(b)(i)-(ix)]. To be denied this type of clemency, however, the perpetrator of such crimes must have known or reasonably should have known of the particular victim's disability [CAL. PENAL CODE §1203.09(a)]. The same criminal acts by a minor, 16 years of age or older, against senior citizens or such handicapped individuals now requires a court to order a probation investigation and report to determine whether such a minor is a "fit and proper subject to be dealt with under the juvenile court law" [CAL. WELF. & INST. CODE §707(b)(12)].

Chapter 1153 adds a provision to the Penal Code that requires denial of

probation to, or suspension of sentences for, persons convicted of a felony while on parole from a prior felony conviction [CAL. PENAL CODE §1203.08, *as added*, CAL. STATS 1977, c. 1153, §1, at — (identical section number added by Chapter 735 of the Statutes of 1977)]. As added, this provision specifies that probation is denied only if the current offense is punishable by imprisonment without an alternate county jail sentence or is a violent offense such as murder, mayhem, rape, and kidnapping [CAL. PENAL CODE §1203.08(a), *as added*, CAL. STATS. 1977, c. 1153, §1, at —. *See generally* CAL. PENAL CODE §667.5]. Additionally, the previous felony conviction from which the person is on parole must have been a violent felony as defined in Section 667.5(c) of the Penal Code [CAL. PENAL CODE §1203.08(b), *as added*, CAL. STATS. 1977, c. 1153, §1, at —]. Finally, the existence of any facts indicating a defendant's ineligibility for probation or suspended sentence under either Chapter 1153 or Chapter 1150, relating to crimes against the elderly and the handicapped, must be included in the indictment or information of the crime charged *and* either be admitted by the defendant in court, found to be true by a jury or a court sitting without a jury, or found to be true based on a plea of guilty or nolo contendere [*See* CAL. PENAL CODE §1203.08, *as added*, CAL. STATS. 1977, c. 1153, §1, at —; CAL. PENAL CODE §1203.09]. Thus, Chapters 735, 1150 and 1153 add to the circumstances and extend the period during which certain convicted felons will absolutely be denied probation or a suspended sentence.

See Generally:

- 1) 7 PAC. L.J., REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION 392 (probation denial) (1976).

Criminal Procedure; Uniform Determinate Sentencing Act—revisions

Corporations Code §25540 (amended); Government Code §11563.5 (repealed); §§11555, 11556 (amended); Health and Safety Code §§1390, 11383 (amended); Military and Veterans Code §1672 (amended); Penal Code §§1170.1, 1170.1b, 1389.3, 2399, Article 2 (commencing with §2920), Article 3 (commencing with §2940), Article 2 (commencing with §3020), 3043, 3044, 3050, 3054, 3055, Article 4 (commencing with §3100) (repealed); §2947 (new); §§148.1, 213, 480, 594, 597.5, 653h, 654, 664, 667.5, 969c, 969d, 1168, 1170, 1170.2, 1170.4, 1191, 1203, 1203.03, 1203.06, 1213.5, 1389.7, 2081.5, 2400, 2401.5, 2402, 2403, 2651, 2684, 2772, 2790, 2911, 2930, 2931, 2932, 3000, 3040, 3041, 3041.5, 3041.7, 3042, 3046, 3052, 3053, 3053.5, 3057, 3059, 3060, 3062, 3084, 4532, 4801, 4802, 4803, 4810, 4812, 4813, 4814, 4850, 4851, 4852.14, 4852.18, 5000, 5001, 5002, 5003.5, 5011, 5055, 5068,

5076.1, 5076.2, 5082, 5089, 6053, 6081, 11193, 11194, 12022, 12022.5, 12022.6, 12022.7 (amended); §1170.1a (amended and renumbered as §1170.1); Welfare and Institutions Code §11483 (amended).

AB 476 (Boatwright); STATS 1977, Ch 165

(Effective July 1, 1977)

Support: California District Attorneys' Association; California Peace Officers' Association

Opposition: American Civil Liberties Union; State of California Public Defender

With the enactment of Chapter 165, sentences imposed for violent and repeat offenders under the Uniform Determinate Sentencing Act of 1976 [hereinafter referred to as the 1976 Act] have been increased. Chapter 165 modifies certain provisions of the fixed-term law in apparent response to some law enforcement officials' protests that the retroactive provisions of the law could result in the release of numerous violent criminals [Sacramento Bee, May 13, 1977, §A at 12, col. 3]. The major amendments made by Chapter 165 involve increases in prison terms for those engaging in specified aggravating conduct [See CAL. PENAL CODE §§1170.1, 12022, 12022.5, 12022.6, 12022.7], increases for those who have previously served time in prison [See CAL. PENAL CODE §3000(d)], and extensions until April 1, 1978 in the review time allowed to impose determinate sentences on those persons sentenced prior to July 1, 1977 [See CAL. PENAL CODE §1170.2].

Sentencing

Under the 1976 Act, each offense given a determinate sentence is assigned a lower, middle, and upper term; one of which is imposed after consideration of the circumstances of the particular crime [CAL. PENAL CODE §1170(a)(2), (b)]. The sentence imposed by the judge from these terms is referred to as the "base term" [See CAL. PENAL CODE §1170.1(f)]. "Enhancements" based on the conduct of the prisoner during commission of the crime or his or her past prison record may then be added to this "base term" [CAL. PENAL CODE §§667.5, 1170.1, 12022, 12022.5, 12022.6, 12022.7]. The amendments to sentencing enacted by Chapter 165 focus on enhancements to the "base term" [See CAL. PENAL CODE §§667.5, 1170.1, 12022, 12022.5, 12022.6, 12022.7].

Penal Code Section 667.5 requires the imposition of additional prison terms for each prior separate prison term served or for the commission of a prior felony that resulted in conviction. Under the 1976 Act, Section 667.5(a) required a three-year enhancement to the terms for defendants being sentenced for one of the violent felonies enumerated in Section 667.5(c) of the Penal Code, who had previously committed one of these

violent felonies and for which he or she had served time in prison [CAL. STATS. 1976, c. 1139, §268, at —]. The 1976 Act provided, however, that if the defendant remained free of prison custody and free of a felony conviction for ten years immediately preceding *the filing of the accusatory pleading* for the crime for which he or she was being sentenced, the enhancement would not apply [CAL. STATS. 1976, c. 1139 §268, at —]. Section 667.5(a), as amended by Chapter 165, now requires the defendant to remain free of the commission of an offense that results in a felony conviction, for the ten years preceding the *commission* of the crime for which he or she is now being sentenced. Chapter 165 has also eliminated the discretion of the courts to strike the enhancement prescribed for persons sentenced for violent felonies, by deleting the language from the 1976 Act that allowed for such discretion in cases in which the court found mitigating circumstances to justify foregoing the imposition of the enhancement [*Compare* CAL. STATS. 1976, c. 1139, §268, at — *with* CAL. PENAL CODE §667.5(a)]. In addition to this three year enhancement for those convicted of prior violent felonies, Section 667.5 now also imposes an extra three year term on those previously convicted of any crime punishable by a life sentence or any offense in which the prisoner used a firearm [CAL. PENAL CODE §667.5(a), (c)]. Further, Section 667.5(b) previously imposed a one year enhancement for defendants who failed to remain free of prison custody for the five years immediately preceding the *filing of an accusatory pleading* that resulted in a new felony conviction [CAL. STATS. 1976, c. 1139, §268, at—]. Pursuant to Chapter 165, to avoid this one year enhancement, Section 667.5(b) now requires the defendant to remain free of both prison custody and the *commission of any felony* that results in a conviction for the five years preceding the *commission* of the felony for which he or she is now being sentenced. Finally, Section 667.5 is amended to include within this definition of a prior prison term, a commitment in excess of one year to the State Department of Health as a mentally disordered sex offender following a conviction for a felony [CAL. PENAL CODE §667.5(i)].

Chapter 165 also amends the enhancement provisions of the 1976 Act for carrying or using firearms or deadly weapons [CAL. PENAL CODE §§12022, 12022.5]. Penal Code Section 12022(a) adds one year to the terms of persons who were *armed* with a firearm during the commission of a crime and Chapter 165 extends this additional term to principals of such crimes even though not personally armed with the firearm [CAL. PENAL CODE §12022(a)]. Section 12022 is further amended to specify that the one year increase for *use* of a deadly weapon applies only if the prisoner personally used such a weapon, and the specific enumeration of deadly weapons included in the 1976 Act is now deleted by Chapter 165 [CAL. PENAL CODE §12022(b)]. Penal Code Section 12022.5 is also clarified by Chapter 165 to

provide that the two year enhancement for *use* of a firearm must involve *personal use*. Furthermore, Chapter 165 has included the crime of assault with a deadly weapon within the provisions of Section 12022.5, which would also result in a two year enhancement to the "base term."

The sentence enhancement imposed by Section 12022.6 of the Penal Code for excessive damage to, or loss of, property has been modified by Chapter 165 to impose an additional one year prison term for losses that exceed \$25,000 [CAL. PENAL CODE §12022.6(a)] and an additional two year term for losses that exceed \$100,000 [CAL. PENAL CODE §12022.6(b)]. Pursuant to the 1976 Act, enhancements for property loss were computed by a "base term" percentage formula and the law required that a taking or property damage must be an element of the crime for which the enhancement was to be imposed [CAL. STATS. 1976, c. 1139, §305.5, at—]. Chapter 165, on the other hand, imposes the additional terms if such a loss occurs during the commission or attempted commission of *any* felony and it has been demonstrated that the defendant possessed the specific intent to cause the loss [CAL. PENAL CODE §12022.6].

Section 12022.7 of the Penal Code adds three years to the sentence of a person who inflicts great bodily injury during the commission of a felony. Under the 1976 Act, however, the law specifically defined the types of injury that would constitute "great bodily injury" and failed to indicate whether liability for this enhancement attached only to the defendant inflicting such injury or to all other principals in the crime as well [See CAL. STATS. 1976, c. 1139, §306, at—]. Chapter 165 redefines "great bodily injury" as "a significant or substantial physical injury" and deletes the list of physical conditions that were previously said to constitute such injury [See CAL. PENAL CODE §12022.7]. Moreover, Section 12022.7 now clearly requires that in order for the three year enhancement to apply, the "great bodily injury" must be personally inflicted by the defendant and includes assault with a deadly weapon and assault by means of force within the exceptions to this section.

Other sentencing changes enacted by Chapter 165 include amendments to the formula for determining the length of, and limits on, consecutive sentences. A person sentenced under the determinate system serves consecutive terms for convictions of two or more felonies [CAL. PENAL CODE §1170.1(a)]. Sentence length for multiple felony convictions is determined by combining the *principal term*, which is the greatest term actually imposed for any of the crimes plus any enhancements, the *subordinate term*, which is one third of the middle term prescribed for each of the other felonies, and *any additional term* imposed pursuant to Section 667.5 for prior imprisonment [CAL. PENAL CODE §1170.1(a)]. Under the 1976 Act, enhancements could not be attached to the subordinate term [CAL. STATS.

1976, c. 1139, §273, at —]. Chapter 165, however, allows enhancements to the subordinate term to be added for multiple felonies if the “other felonies” are violent felonies as defined by Section 667.5(c) [CAL. PENAL CODE §1170.1(a)]. Moreover, the 1976 Act did not allow the aggregate of the subordinate terms to exceed five years [CAL. STATS. 1976, c. 1139, §273, at—], whereas Chapter 165 amends this provision to allow the total of the subordinate terms for consecutive offenses to exceed five years if the added time was imposed because of conviction for a violent crime, prior imprisonment, or commission of a crime while in prison [CAL. PENAL CODE §1170.1(a), (b)]. Prior to modification by Chapter 165, the determinate sentencing law provided that the total term of imprisonment could not exceed twice the base term *unless* the defendant was convicted of a violent crime or the term was increased by an enhancement for use of a firearm or deadly weapon or the defendant inflicted great bodily injury [CAL. STATS. 1976, c. 1139, §273, at—]. Chapter 165 adds to these exceptions those crimes involving excessive property loss and crimes committed while in prison [CAL. PENAL CODE §1170.1(f); *see* CAL. PENAL CODE §§1170.1(a), 12022.6]. Pursuant to the 1976 Act, even if the enhancements relating to deadly weapons, and firearm use or great bodily injury all applied to a single offense, the law allowed for the imposition of only one such enhancement [CAL. STATS. 1976, c. 1139, §273, at—]. Chapter 165, however, permits the application of two enhancements if the “enhancing” conduct occurs during the commission or attempted commission of rape, robbery, or burglary [CAL. PENAL CODE §1170.1(d)]. Further, the 1976 Act imposed a separate and consecutive sentence for crimes committed while in prison [CAL. STATS. 1976, c. 1139, §273, at—]. Chapter 165 extends this provision to crimes committed by defendants while on escape from prison [CAL. PENAL CODE §1170.1(b)].

Generally, the sentence imposed under the determinate sentencing law is the middle term of the three specified for a particular offense [CAL. PENAL CODE §1170(b)], but the 1976 Act provided a procedure for the imposition of an upper or lower term upon a motion of counsel to introduce mitigating or aggravating evidence at a separate hearing [CAL. STATS. 1976, c. 1139, §273, at—]. Chapter 165 simplifies this procedure by no longer requiring a separate hearing to introduce such evidence and by specifying that either party may introduce evidence in aggravation or mitigation to dispute facts in the record or to present additional facts by merely submitting a statement to this effect at least *four days* prior to the time set for judgment [CAL. PENAL CODE §1170(b)]. Moreover, determinate sentences that have been imposed must be reviewed within the first year [CAL. PENAL CODE §1170(f)]. Chapter 165 now allows for a review of probation denial during this sentence review procedure [CAL. PENAL CODE §1170(f)].

In summary, the major sentencing changes made by Chapter 165 focus on enhancements to the base term of punishment for repeat and violent offenders. These changes appear to be consistent with the stated purpose of determinate sentencing, which is to punish offenders [CAL. PENAL CODE §1170(a)], and the implied purpose, which is to establish a fair system of punishment proportionate to the gravity of the crime [See 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 292 (Uniform Determinate Sentencing Act) (1977)]. Furthermore, in response to contentions that the 1976 Act would have resulted in the wholesale release of a number of violent criminals [Sacramento Bee, May 13, 1977, §A, at 12, col. 3], Chapter 165 would appear to provide a means to prevent the possible premature release of such persons.

Parole

Chapter 165 makes a number of changes in the Penal Code provisions governing the granting of parole. Significantly, Chapter 165 has amended Penal Code Section 3000 to declare that the purpose of parole is to provide for successful reintegration of the offender into society. Furthermore, Section 3000(d), as amended, increases the total potential parole time for parole violators from one year to 18 months for persons sentenced under Penal Code Section 1170 and from three to four years for persons sentenced to life under Penal Code Section 1168. Chapter 165 further amends Section 3000 to make clear that sentences imposed under the determinate system must include a period of parole [*Compare* CAL. PENAL CODE §3000 *with* CAL. STATS. 1976, c. 1139, §278, at—]. Another clarification of Section 3000 made by Chapter 165 is that the parole provisions of the Determinate Sentencing Act are prospective [CAL. PENAL CODE §3000(d)]. Prior to the enactment of Chapter 165, the maximum period of parole under the 1976 Act was computed from the date of the initial granting of parole, which would have resulted in the release of a prisoner who had served the maximum parole period on or before July 1, 1977 [CAL. STATS. 1976, c. 1139, §278, at—]. Furthermore, the 1976 Act allowed the parole period to run without interruption, which meant that a person who violated parole could be reincarcerated only for the remainder of the maximum parole period [See CAL. STATS. 1976, c. 1139, §278, at—]. Section 3000(d) now provides that the maximum parole period must be computed from the date of initial parole, or July 1, 1977, *whichever is later*, thereby ensuring prospective application of the parole provisions of the determinate sentencing law and would no longer allow a prisoner to credit time spent reincarcerated for parole violations against the total parole time imposed.

Retroactivity

The Uniform Determinate Sentencing Act of 1976 was made retroactive by Penal Code Section 1170.2, which provided that all prisoners sentenced before July 1, 1977, were to have their sentences reviewed and conformed to the new law by September 28, 1977 [CAL. STATS. 1976, c. 1139, §273, at—]. Chapter 165, on the other hand, now gives the Community Release Board until April 1, 1978 to review these sentences with a possible 90 day extension beyond April 1, based upon a resolution by the Community Release Board, unless such resolution is vetoed by either house of the legislature [CAL. PENAL CODE §1170.2(b)]. Furthermore, under the 1976 Act the Community Release Board was to be guided by, among other things, what could be reasonably imposed upon a person convicted after the effective date of the law for a similar crime and under similar circumstances [CAL. STATS. 1976, c. 1139, §273, at—]. Chapter 165 has amended Section 1170.2(b) to not so limit the board to such guidelines, but fails to set out new additional guidelines.

Reduction of Sentences

The 1976 Act sets forth a system whereby total imprisonment time may be reduced by a system of credits against the person sentenced [See CAL. PENAL CODE §§2931, 2932]. Prior to amendment by Chapter 165, Penal Code Section 1203.03 allowed patients of the California Rehabilitation Center to credit time spent as a patient against their total sentence time. As amended, Section 1203.03 excludes “outpatients” from those allowed to credit time spent as a patient [CAL. PENAL CODE §1203.03(g)].

Finally, Chapter 165 amends various code sections to bring them into conformity with the determinate sentencing law and applies determinate sentences to crimes not given fixed sentences by the 1976 Act [E.g., CAL. HEALTH & SAFETY CODE §1390; CAL. PENAL CODE §§148.1, 480, 653h, 2772, 2790].

The legislature declared in the Uniform Determinate Sentencing Act of 1976 “that the purpose of imprisonment for crime is punishment” and that “[t]his purpose is best served by terms proportionate to the seriousness of the offense” [CAL. PENAL CODE §1170(a)(1)]. Thus, the amendments to this determinate sentencing law that have been enacted by Chapter 165 would appear to further emphasize this objective by imposing more severe sentences on repeat and violent offenders.

See Generally:

- 1) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 282 (Uniform Determinate Sentencing Act) (1977).
- 2) Cassou, Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 1 (1978).

Criminal Procedure; judicial commitments—mentally disordered sex offenders

Welfare and Institutions Code §§6316.1, 6316.2 (new); §6316 (amended); §6325.1 (amended and renumbered as 6325.2).

SB 1178 (Presley); STATS 1977, Ch 164

California law provides for the criminal commitment to a state hospital or other mental health facility of mentally disordered sex offenders who the court determines will benefit by treatment [CAL. WELF. & INST. CODE §6316. *See generally* CAL. WELF. & INST. CODE §§6300-6330]. Prior to the enactment of Chapter 164, Section 6316 of the Welfare and Institutions Code permitted the indeterminate criminal commitment of mentally disordered sex offenders to a state hospital or other mental health facility, provided that the indeterminate term of commitment did not exceed the aggregate maximum prison term that could have been imposed for the offense or offenses of which he or she was convicted [CAL. STATS. 1976, c. 1161, §9, at—].

By omitting the indeterminate commitment language from Section 6316, Chapter 164 now permits the imposition of determinate terms for mentally disordered sex offenders and provides specific procedures for calculating such terms [CAL. WELF. & INST. CODE §§6316.1-.2]. Section 6316.1(a), as added by Chapter 164, establishes a formula for determining criminal commitments for mentally disordered sex offenders who have committed a felony on or after July 1, 1977. Under this formula such persons are committed by the court for the longest term of imprisonment that can be imposed pursuant to the determinate sentencing system [CAL. WELF. & INST. CODE §6316.1(a)]. Furthermore, the defendant's commitment period is reduced only for time already spent in custody for his or her offense and is not reduced for participation in work programs or for good behavior pursuant to Penal Code Sections 2930, 2931 and 2932 [CAL. WELF. & INST. CODE §6316.1(a)]. These commitment procedures also apply to those persons who committed felonies prior to July 1, 1977, if those felonies would have been given a determinate sentence under Penal Code Sections 1168 or 1170 had the offense been committed after July 1, 1977 [CAL. WELF. & INST. CODE §6316.1(b)]. Within 90 days of the date a person is received by the State Department of Health, the Community Release Board, not the court, is required to fix the sentence for these offenders or notify the offender of the time scheduled for a hearing at which his or her term will be fixed [CAL. WELF. & INST. CODE §6316.1(b)]. Terms for persons who committed felonies prior to July 1, 1977, may exceed the maximum term imposed pursuant to Section 6316.1(a) if at least two members of a three member Community Release Board panel find specified

aggravated circumstances, which include prior criminal convictions, the use of a deadly weapon, or the infliction of great bodily injury during the commission of the felony for which the person is being committed [CAL. WELF. & INST. CODE §6316.1(b). *See generally* CAL. PENAL CODE §1170.2(b)]. The procedures and guidelines of Penal Code Section 1170.2 must be followed when a hearing is conducted to impose this longer term, and the hearing must be held prior to April 1, 1978 [CAL. WELF. & INST. CODE §6316.1(b)]. In addition, persons found to be mentally disordered sex offenders who committed a misdemeanor either before or after July 1, 1977, are now committed for a term equal to the maximum county jail term that could have been imposed for such misdemeanor [CAL. WELF. & INST. CODE §6316.2].

Chapter 164 adds Penal Code Section 6316.2 to allow the commitment of a mentally disordered sex offender to exceed the maximum term imposed under Section 6316.1. This additional term can be imposed only if the person committed a felony sex offense before or after July 1, 1977, or a misdemeanor sex offense before July 1, 1977, *and* the person exhibits a tendency that he or she will continue to commit sex offenses [CAL. WELF. & INST. CODE §6316.2(a)]. If a person qualifies under these conditions as set out in Section 6316.2(a), the prosecuting attorney, acting on the recommendation of the Director of Health may submit a petition to the superior court to have the sex offender's commitment extended beyond the maximum term imposed under Section 6316.1 [CAL. WELF. & INST. CODE §6316.2(b)]. Such petition, however, must be filed 90 days before the end of the original term imposed, must contain a statement of reasons for the additional term, and must explain to the patient his or her rights to counsel and jury trial, and must further explain that he or she is entitled to all other constitutional rights that apply in any criminal proceeding [CAL. WELF. & INST. CODE §6316.2(b)-(e)]. This additional commitment period is for one year from the termination of the previous commitment or recommitment, which would seem to indicate that a person's commitment time may be extended more than once [*See* CAL. WELF. & INST. CODE §6316.2(f)]. Chapter 164 further states that Section 6316.2 will be in effect only until January 1, 1979, at which time it will be repealed [CAL. WELF. & INST. CODE §6316(i)].

Thus, the legislature by enacting Chapter 164, has attempted to prevent the premature release of mentally disordered sex offenders [CAL. STATS. 1977, c. 164, §6, at—] and it is intended that this new law operate in conjunction with other provisions of law that also became effective July 1, 1977, which were similarly designed to prevent the premature release of numerous violent criminals pursuant to the Uniform Determinate Sentencing Act. [*See* CAL. STATS. 1977, c. 165, §§13, 91-94, at—].

COMMENT

Since the provisions added by Chapter 164 apply retrospectively [CAL. WELF. & INST. CODE §§6316.1, 6316.2] and could possibly impose longer terms than could have been imposed upon the persons who committed offenses prior to July 1, 1977, such provisions raise the spectre of violation of the ex post facto protections contained in the United States and California Constitutions [See U.S. CONST. art. I, §10; CAL. CONST. art. I, §9]. An ex post facto law is one which, among other things, inflicts greater punishment than the law imposed for the crime at the time it was committed [See, e.g., *Lindsey v. Washington*, 301 U.S. 397, 401 (1936); *Kring v. Missouri*, 107 U.S. 221, 228 (1882); *People v. Potter*, 240 Cal. App. 2d 621, 629, 49 Cal. Rptr. 892, 898 (1966)].

Prior to January 1, 1977, persons committed pursuant to Welfare and Institutions Code Section 6316 were subject to a *civil* commitment for an indefinite period, either until rehabilitated, or if found untreatable, for life [See *In re Bevill*, 68 Cal. 2d 854, 861, 442 P.2d 679, 682, 69 Cal. Rptr. 599, 602 (1968); CAL. STATS. 1970, c. 685, §3, at 1313]. Effective January 1, 1977, and prior to amendment by Chapter 164, Section 6316 of the Welfare and Institutions Code provided that mentally disordered sex offenders were to be *criminally* committed for an indeterminate term that could not exceed the aggregate maximum term that could have been imposed for the offense or offenses for which he or she was convicted [See CAL. STATS. 1976, c. 1101, §9, at—]. With the enactment of Chapter 164, mentally disordered sex offenders must be criminally committed for a determinate term with the possibility of serving an additional term if found to exhibit a tendency to continue to commit sex offenses [CAL. WELF. & INST. CODE §§6316.1, 6316.2]. In considering whether Chapter 164 constitutes an ex post facto application of the law, only those persons sentenced between January 1, 1977, and July 1, 1977, could be affected. Those persons committed prior to January 1, 1977, were subject to *civil* commitment and the constitutional prohibition against ex post facto laws relates to criminal proceedings and commitments only and not to civil proceedings [See *Furnish v. Board of Medical Examiners*, 149 Cal. App. 2d 326, 331, 308 P.2d 924, 927-28, (1957), *cert. denied*, 355 U.S. 827 (1957)]. On the other hand, persons declared mentally disordered sex offenders who committed an offense and were *criminally* committed between January 1, 1977, and July 1, 1977, could have been given an aggregate maximum term under the provision of Section 6316.1 of the Welfare and Institutions Code, which may now be increased beyond that maximum [See CAL. WELF. & INST. CODE §6316.2]. If this increase in commitment is a *punishment* more onerous than the standard of punishment that could have been applied to a

crime committed before enactment of Chapter 164, it would be an unconstitutional ex post facto law [*See* *Lindsey v. Washington*, 301 U.S. 397, 401 (1936); *In re Dewing*, 19 Cal. 3d 54, 56-58, 560 P.2d 375, 375-76, 136 Cal. Rptr. 708, 708-09 (1977)].

Since Section 6316.2 applies only to those mentally disordered sex offenders who are amenable to treatment [*See* CAL. WELF. & INST. CODE §§6316, 6316.2(i)], it is arguable that the recommitment period will be considered treatment rather than punishment. If found to be treatment, the provision extending commitment would not violate constitutional protections against ex post facto law since an ex post facto law has been defined as a law that inflicts a greater punishment than could have been imposed at the time the crime was committed [*See, e.g.*, *Lindsey v. Washington*, 301 U.S. 397, 401 (1936); *Peopel v. Potter*, 240 Cal. App. 2d 621, 629, 49 Cal. Rptr. 892, 898 (1966)], and would appear to exclude treatment. This “treatment” rationale is bolstered by the language of Chapter 164, which provides that any commitment of a mentally disordered sex offender pursuant to this article places an affirmative obligation on the Department of Health to provide *treatment* for the underlying causes of the person’s mental disorder [CAL. WELF. & INST. CODE §6316.2(i)]. Conversely, Section 6 of Chapter 164 specifies that this new law is “designed to provide additional safeguards against the premature release of dangerous persons,” which appears to be inconsistent with a “treatment” philosophy [CAL. STATS. 1977, c. 164, §6, at—]. Furthermore, the extended commitment procedures specifically apply to a person who “[s]uffers from a mental disorder, . . . is predisposed to the commission of sexual offenses to such a degree that he presents a serious threat of substantial harm to the health and safety of others” [CAL. WELF. & INST. CODE §6316.2(a)(2)]. As stated in *United States v. Brown* [381 U.S. 437 (1965)]: “One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment” [*Id.* at 458]. Thus, the “protection of society” purpose expressly stated in Chapter 164 may persuade a court to consider this extended commitment as punishment [*See* CAL. WELF. & INST. CODE §6316.2(a)(2)], and if the extended commitment inflicts a greater punishment upon persons sentenced between January 1, and July 1, 1977 than they could have received at the time of commitment [*Compare* CAL. WELF. & INST. CODE §6316.2 with CAL. STATS. 1976, c. 1101, §9, at—], it would appear to fall within the definition of an ex post facto application of the law [*Cf.* *Lindsey v. Washington*, 301 U.S. 397 (1936) (when less than maximum term allowed at time of commission of crime, new statute imposing mandatory maximum term was ex post facto application of the law); *In re Dewing*, 19 Cal. 3d 54, 560 P.2d 375, 136 Cal. Rptr.

708 (1977) (declared legislation extending the maximum discharge date from Youth Authority custody as applied to persons committed to such custody prior to the enactment of the legislation to be an ex post facto application of the law)].

See Generally:

- 1) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 295 (mentally disordered sex offenders) (1977).

Criminal Procedure; incompetency to stand trial—developmentally disabled

Penal Code §§1370.1 (repealed); §1370.1 (new); §§ 1367, 1369, 1370, 1375.5 (amended); Welfare and Institutions Code §6500.1 (amended).

AB 1722 (Lanterman); STATS 1977, Ch 695

Support: Regional Centers for the Developmentally Disabled; State of California Public Defender

Chapter 695 has apparently been enacted to restructure the procedures followed in the determination and restoration of the mental competence to stand trial of developmentally disabled criminal defendants [*See* CAL. PENAL CODE §§1369, 1370.1]. Under the prior law the procedures for monitoring a developmentally disabled defendant's progress towards recovering his or her mental competence differed from the procedures established for monitoring the progress of a mentally disordered defendant [*Compare* CAL. STATS. 1976, c. 1158, §1, at — *with* CAL. STATS. 1975, c. 1274, §4, at 3393-95]. While retaining the basic distinction that developmentally disabled defendants are to be handled by the regional center for developmental disabilities and mentally disordered defendants are to be handled by the county mental health director, Chapter 695 establishes procedures for the treatment and evaluation of developmentally disabled defendants to parallel the procedures applicable to mentally disordered defendants pursuant to Section 1370 of the Penal Code [*See* CAL. PENAL CODE §§1370, 1370.1. *See generally* CAL. HEALTH & SAFETY CODE §§38000-38500]. Furthermore, Chapter 695 makes clear that a person found to be incompetent to stand trial as a result of a mental disorder, but who is also developmentally disabled, will be committed and treated in accordance with procedures established for developmentally disabled persons [CAL. PENAL CODE §1367. *See generally* CAL. PENAL CODE §1370.1]. The term "developmentally disabled" is defined in Section 1370.1 of the Penal Code as a disability that continues or can be expected to continue indefinitely, constituting a substantial handicap for an individual including mental retardation, cerebral palsy, epilepsy, and autism. The term also includes handicapping conditions closely related to mental retardation or requiring treat-

ment similar to that required for the mentally retarded, while excluding handicapping conditions solely physical in nature [CAL. PENAL CODE §1370.1(a)]. A “mentally disordered” person is one who suffers from any of the mental disorders set forth in the Diagnostic and Statistical Manual of Mental Disorders Current Edition of the American Psychiatric Association [9 CAL. ADM. CODE §813].

Section 1367 of the Penal Code provides that no person can be tried or adjudged to punishment while he or she is mentally incompetent. A person is now deemed mentally incompetent to stand trial if, due to a mental disorder or *developmental disability*, he or she is unable to understand the nature of the proceedings and to assist counsel with his or her defense [CAL. PENAL CODE §1367]. Section 1369 of the Penal Code sets forth the procedures to be followed when a trial is held on the question of the defendant’s competency, including the provisions for the examination of the defendant by psychiatrists and/or psychologists. Section 1369 has been amended by Chapter 695 to also require the court to appoint the director of the regional center for the developmentally disabled or his or her designee to examine the defendant when it is suspected that the defendant is developmentally disabled [CAL. PENAL CODE §1369(a)]. Furthermore, to facilitate this examination, the court may now order a defendant to be confined in a state hospital or residential facility designated by the regional center director for the purpose of this examination [CAL. PENAL CODE §1369(a)].

Section 1370.1 of the Penal Code has been rewritten to provide commitment and treatment procedures for developmentally disabled defendants that parallel those established for defendants found to be incompetent to stand trial due to a mental disorder [*Compare* CAL. PENAL CODE §1370.1 with CAL. PENAL CODE §1370]. When a developmentally disabled defendant is found to be incompetent, pursuant to Section 1370.1 the trial or judgment is suspended until the defendant regains his or her competence [CAL. PENAL CODE §1370.1(a)]. The court is required to order the incompetent defendant to be delivered by the sheriff or another designated person to a state hospital for the developmentally disabled or to a residential facility approved by the regional center director or placed under an outpatient treatment program established pursuant to Section 1370.3 in order to promote the speedy restoration of the defendant’s mental competence [CAL. PENAL CODE §1370.1(a)]. Once a developmentally disabled defendant has regained his or her competence to stand trial, this person must be redelivered to the court at which time criminal proceedings may resume, although any time spent in a hospital, residential facility, or on outpatient treatment is credited to any term of imprisonment to which the defendant is sentenced [CAL. PENAL CODE §§1370.1(a), 1375.5].

To aid the court in its determination, the regional center director or his or her designee must evaluate the defendant and within 15 judicial days of the order, recommend in writing whether the defendant should be required to undergo outpatient treatment or be committed to a state hospital or residential facility [CAL. PENAL CODE §1370.1(a)]. Section 1370.1 of the Penal Code specifies that no defendant charged with the commission of certain violent crimes including felonies involving death, great bodily injury, or which pose a threat of great bodily injury, may be released on an outpatient program for at least 90 days [CAL. PENAL CODE §1370.1(a)]. Before such a developmentally disabled defendant may be released on outpatient treatment, the court must determine that the defendant is eligible to be released on bail or on his or her own recognizance [CAL. PENAL CODE §1370.1(a)].

A developmentally disabled defendant committed to a state hospital or residential facility may be transferred to another state hospital or residential facility upon court order [CAL. PENAL CODE §1370.1(a)]. The defendant or prosecuting attorney, after receiving the required notification of the ordered transfer, may contest the transfer by petitioning the court for a hearing [CAL. PENAL CODE §1370.1(a)]. This hearing must be conducted by the same standards used during a probation revocation hearing and must be held if sufficient grounds exist, at which time the defendant and prosecuting attorney may present evidence concerning the order to transfer [See CAL. PENAL CODE §1370.1(a). See generally CAL. PENAL CODE §1203.2].

To further bring the procedures followed for the developmentally disabled in line with those applicable to the mentally disordered, Section 1370.1 now requires the superintendent of the state hospital or residential facility to which the developmentally disabled defendant has been committed or placed on outpatient treatment to make a written report, within 90 days of commitment, to the regional director or his or her designee on the defendant's progress towards recovery of his or her mental competence [CAL. PENAL CODE §1370.1(b)]. This report is to be immediately transmitted by the regional center director to the court as part of the defendant's progress report [CAL. PENAL CODE §1370.1(b)(1)]. If the report discloses that the defendant is still mentally incompetent but that there is a substantial likelihood that he or she will regain his or her competence in the *foreseeable future*, the defendant must remain in the state hospital or residential facility or on outpatient treatment [CAL. PENAL CODE §1370.1(b)(1)]. In addition, Section 1370.1(b)(1) now requires progress reports to be made at six month intervals or until the defendant regains his or her mental competence. The regional center director must immediately transmit these progress reports to the court and provide a copy of the reports to the defendant, the defendant's attorney of record and any other interested person specified by the defendant [CAL. PENAL CODE §1370.1(b)(4)]. If a developmentally disabled defendant

is still confined or in an outpatient program after 18 months, the defendant must be returned to the committing court and a new trial to determine his or her competency pursuant to Section 1369 must be held [CAL. PENAL CODE §1370.1(b)(2)].

Like mentally disordered criminal defendants, the developmentally disabled defendant is no longer subject to further confinement in a state hospital or residential facility or required to undergo outpatient treatment on the basis of *criminal charges* if: (1) the criminal charges have been dismissed before the defendant recovers competence; (2) the regional center director's report filed after 90 days of evaluation, indicates there is no substantial likelihood that the defendant will recover his or her competence in the *foreseeable future*; or (3) the defendant has not regained his or her competence within three years of commitment or within a period equal to the maximum prison term for the most serious offense charged, whichever is shorter [See CAL. PENAL CODE §1370.1(a)-(c)]. A developmentally disabled defendant falling within any of the above categories, however, may be *civilly* committed pursuant to the Lanterman-Petris-Short Act or Section 6502 of the Welfare and Institutions Code if he or she is a danger to himself or herself or others, which, for the purpose of Section 6500.1, now includes any person who has been found to be incompetent to stand trial pursuant to Section 1367 of the Penal Code and has been charged with the commission of one of the specified violent crimes involving death, great bodily injury, or which pose a threat of great bodily injury [CAL. PENAL CODE §1370.1(a)-(c); see CAL. WELF. & INST. CODE §6500.1. See generally CAL. WELF. & INST. CODE §§5000-5401, 6402]. In any event, Section 1370.1 provides that all criminal charges may be dismissed in the furtherance of justice pursuant to Section 1385 [CAL. PENAL CODE §1370.1(c)(2), (d)], or if the regional center director recommends the dismissal of such charges based upon a finding that the behavior of the defendant relating to the defendant's criminal offense has been eliminated [CAL. PENAL CODE §1370.1(d)]. Thus, Chapter 695 has apparently been enacted to establish commitment procedures for the developmentally disabled defendant found incompetent to stand trial that parallel the commitment procedures used for the mentally disordered defendants.

See Generally:

- 1) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 382 (developmentally disabled persons) (1977).
- 2) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 273 (commitment of mentally incompetent criminal defendants) (1975).

Criminal Procedure; withdrawal of guilty pleas—aliens

Penal Code §1016.5 (added).

SB 276 (Garcia); STATS 1977, Ch 1088

Support: California Attorneys for Criminal Justice; California Organization of Police and Sheriffs; California Trial Lawyers' Association

Opposition: California District Attorney's Association; California Police Officer's Association

Chapter 1088 adds Section 1016.5 to the Penal Code in an attempt to promote fairness to legal aliens by removing the discretionary power of the trial court to grant or deny a motion to withdraw a guilty plea or plea of nolo contendere in situations in which a legal alien defendant was not informed that such a plea could result in deportation, exclusion of admission to the United States, or denial of naturalization [CAL. PENAL CODE §1016.5]. In *People v. Superior Court* [11 Cal. 3d 793, 523 P.2d 636, 114 Cal. Rptr. 596 (1974)], a guilty plea was set aside because defendant, his counsel, the prosecutor, and the court were unaware that deportation could result from this guilty plea [*Id.* at 795-96, 523 P.2d at 638, 114 Cal. Rptr. at 598]. Defendant's plea of guilty was not withdrawn, however, in *People v. Flores* [38 Cal. App. 3d 484, 113 Cal. Rptr. 272 (1974)], since defendant's counsel had informed him of the deportation risk and defendant's only argument was that he did not understand the degree of risk involved [*Id.* at 488, 113 Cal. Rptr. at 274]. These two cases would appear to have presented trial courts with the dilemma of deciding just when and what type of "notice of consequences" must be provided to legal alien defendants. Chapter 1088 seems to resolve this problem by now requiring a court to inform legal alien defendants of the possibility of deportation, exclusion of admission to the United States, or denial of naturalization, before accepting defendant's plea of guilty or nolo contendere [CAL. PENAL CODE §1016.5(a)]. Additionally, Chapter 1088 provides that after explaining these consequences to a legal alien defendant, such a defendant may request, and the court must then grant, a reasonable opportunity for reconsideration prior to entering a final plea [CAL. PENAL CODE §1016.5(b)]. If compliance with the provisions of Section 1016.5(a)(b) are not met, upon motion of the defendant, such failure to advise the defendant or record this advisement requires the court to vacate the judgment and allows the defendant to withdraw his or her plea of guilty or nolo contendere and enter a plea of not guilty [CAL. PENAL CODE §1016.5(b)].

Further, Chapter 1088 specifies that no defendant shall be required to disclose his or her alien status at the time the plea is entered and if a defendant or his or her attorney are unaware of the consequences of convic-

tion the court must now give the defendant a reasonable amount of time to negotiate with the prosecuting agency [CAL. PENAL CODE §1016.5(d)]. Finally, in an apparent attempt to foreclose any arguments that could have been raised as to the retroactive application of Chapter 1088, the legislature specified the effective date of these provisions as January 1, 1978 [CAL. PENAL CODE §1016.5(b), (c); *see* CAL. GOV'T CODE §9600].

See Generally:

- 1) 8 U.S.C. §1251(a)(4) (deportation of aliens—general classes) (1970).

Criminal Procedure; court interpreters for the deaf

Evidence Code §754 (amended).

SB 838 (Russell); Stats 1977, Ch 1182

Support: California Association for the Deaf

Statutory law previously required that interpreters only be provided by the courts when a deaf person was the defendant in a criminal action or the subject of a commitment proceeding [CAL. STATS. 1965, c. 299, §754, at 1314]. These prior provisions have been expanded by Chapter 1182 and now require that qualified interpreters be employed when a deaf person is a party to or a witness in, and is required to be present at any criminal action, juvenile case or proceeding, proceeding to determine the mental competency of a person, or administrative hearing [CAL. EVID. CODE §754(b)]. Chapter 1182 defines a qualified interpreter for the deaf as one who: (1) has been issued a certificate of competency appropriate for the purpose of interpreting the specified proceedings by the National Registry of Interpreters for the Deaf, by an affiliated state group, or by another group determined by the California Judicial Council to possess a level of competence in training, testing and certification equivalent to that of the National Registry [CAL. EVID. CODE §754(c)(1)]; *and* (2) has been included on a list of recommended court interpreters to be established by the county superior court [CAL. EVID. CODE §754(c)(2)]. If the only available interpreter does not possess adequate skill for the particular situation, or if the interpreter is not familiar with the slang of the deaf person, such person may appoint an intermediary to act between himself or herself and the appointed interpreter [CAL. EVID. CODE §754(d)]. Section 754(d), however, does not specify who is to determine whether the available interpreter possesses adequate skills. Nevertheless, it would appear that the court, since it must grant permission for the nomination of intermediaries, may be best situated to make this determination [*See* CAL. EVID. CODE §754(d)]. Neither the interpreter nor the intermediary, however, may be an interested party, as such a relationship may call into question the accuracy of the interpreted statement and may constitute grounds for mistrial [*Cf.* *People v. Walker*, 69 Cal. App.

475, 493, 231 P. 572, 579 (1925) (one of several grounds for mistrial was based upon fact that defendant's wife acted as interpreter and appeared to embellish upon defendant's statements)]. Additionally, no statement made by a deaf person in response to a question of a peace officer may be admitted into evidence against such person in a criminal or quasi-criminal proceeding, unless the statement was either made or elicited knowingly, voluntarily and intelligently through a qualified interpreter, or found specially by the court to have been made knowingly, voluntarily and intelligently [CAL. EVID. CODE §754(f)]. Thus, Chapter 1182 would appear to enhance the uniform quality and availability of court interpreters for the deaf and to ensure that any statement made by a deaf person is voluntarily made and accurately interpreted.

Criminal Procedure; psychological testing and counseling of child abusers

Business and Professions Code §§2192, 2736 (amended); Penal Code §§273ab, 1203h, 3001 (new).

AB 1596 (Antonovich); STATS 1977, Ch 1130

Support: California Child Care Coordinating Council; California Welfare Directors Association; Delinquency Control Institute; Parents Anonymous

In an apparent response to the increasing incidence of child abuse [*See R. HEFLER & C. KEMPE, CHILD ABUSE AND NEGLECT* xv (1976)] and the recognition that, through psychological treatment and counseling, most child abusers can be successfully rehabilitated [*See Steele & Pollock, A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in *THE BATTERED CHILD* 124 (1974)] the legislature has enacted Chapter 1130 to make certain changes in the criminal process for alleged and convicted child abusers. Section 273ab has been added to the Penal Code to provide that, in lieu of prosecuting an individual suspected of child abuse [*See generally* CAL. PENAL CODE §§261.5, 270, 273a, 273d, 273g, 288, 288a], the prosecuting attorney, with the advice of the county social services department, *may* refer the individual to such county departments for counseling and other related services [CAL. PENAL CODE §273ab], however, the prosecuting attorney apparently lacks the authority to *compel* suspected child abusers to undergo such counseling and other related therapy [*Compare* CAL. PENAL CODE §273ab with AB 1596, 1977-78 Regular Session, *as introduced*, April 13, 1977 and AB 1596, 1977-78 Regular Session, *as amended*, May 17, 1977]. Section 273ab also declares that it is the intent of the legislature that the "in lieu of prosecution" provision should *not* in any

way deprive the prosecuting attorney of his or her ability to prosecute a suspected child abuser "to the fullest extent of the law" if he or she so chooses [CAL. PENAL CODE §273ab].

Presently, the trial court, in its discretion, can order a convicted felon to the diagnostic facility of the Department of Corrections, for a period not to exceed 90 days, for the purpose of determining whether the individual should undergo psychiatric or psychological treatment [CAL. PENAL CODE §1203.03]. The work of these diagnostic facilities includes a scientific study of the prisoner, his or her life career, the cause of the criminal acts, and recommendations for the prisoner's treatment, care, and employment with the "view to his [or her] reformation and to the protection of society" [CAL. PENAL CODE §5079]. Similarly, if a court now initiates a probation investigation of a convicted child abuser, Chapter 1130 requires that this investigation include a "psychological evaluation," which is designed to determine the extent of counseling necessary for "successful rehabilitation" of the individual, and thus, to indicate to a court the amount of counseling that should be required during a probation period [CAL. PENAL CODE §1203h]. In addition, the Community Release Board is now required to order the preparation of such an evaluation on any convicted child abuser whose case is reviewed by the board to determine the extent of counseling that may be required as a condition of parole [CAL. PENAL CODE §3001]. This evaluation can be prepared by psychologists or licensed clinical social workers as well as psychiatrists [CAL. PENAL CODE §§1203h, 3001]. Apparently, psychologists and licensed clinical social workers are less expensive and more accessible to probation officers than psychiatrists [Memorandum from Assembly Office of Research to Assemblyman Mike D. Antonovich, June 10, 1977 (copy on file at *Pacific Law Journal*)]. In addition, it is believed that because these professionals have training in detecting psychological disorders, they may in some instances be better equipped to diagnose a convicted child abuser than is a psychiatrist [*Id.*].

Since the purpose of preparing this evaluation is apparently to assist in the reformation of the prisoner and the protection of society, especially children, it is likely that the profile prepared by these professionals will consist of the same basic elements as the studies made by diagnostic facilities of the Department of Corrections; specifically a scientific study of the prisoner, his or her career and life history, the apparent causes of his or her criminal acts, and any recommendations for the prisoner's immediate and future treatment and employment [*See* CAL. PENAL CODE §5079].

To facilitate the early detection of child abuse, Section 2192 of the Business and Professions Code has been amended to add a course in "child abuse detection and treatment" to the required curriculum of an applicant for licensure as a physician and surgeon in this state [CAL. BUS. & PROF.

CODE §2192]. In summary, by requiring that probation and parole investigations include a psychological evaluation, Chapter 1130 appears to offer the court and the Community Release Board a greater range of alternatives for the treatment of convicted child abusers.

See Generally:

- 1) B. WITKIN, *CALIFORNIA CRIMINAL PROCEDURE, Judgement and Attack in Trial Court* §613A (temporary detention at diagnostic facility) (Supp. 1975).

Criminal Procedure; use of state crime laboratory facilities

Penal Code §11050.5 (amended).

SB 979 (Sieroty); STATS 1977, Ch 451

Support: California State Bar

Opposition: California Peace Officers' Association

In an apparent response to a legislative proposal from the State Bar of California [See STATE BAR OF CALIFORNIA 1975 CONFERENCE RESOLUTION 1-36] the legislature has enacted Chapter 451 to allow private court appointed counsel access to the laboratory facilities, services, and technical experts of the State Department of Justice in those counties that have contracted with the attorney general for the use of such facilities and services [CAL. PENAL CODE §11050.5]. Formerly, access to such experts as fingerprint and document examiners, criminalists, and intelligence specialists was limited to public defenders, and state and local law enforcement officials [CAL. STATS. 1974, c. 114, §1 at 230]. It has been argued, however, that the need for such technical and laboratory assistance is greater for a private court appointed counsel who, unlike a public defender, does not have funds budgeted for such purposes [STATE BAR OF CALIFORNIA 1975 CONFERENCE RESOLUTION 1-36]. To this end, Section 11050.5 of the Penal Code has been amended to grant a private court appointed counsel the same access to crime laboratory facilities and technical personnel as is presently afforded a public defender [CAL. PENAL CODE §11050.5]. Section 11050.5 continues to provide, however, that unless the county, whose public defender or court appointed counsel has requested the use of these facilities, contracts with the attorney general for the payment of the reasonable costs of services provided, no information, services, or facilities will be made available to these state employed defenders [CAL. PENAL CODE §11050.5(b)].

In addition, Chapter 451 requires that the results of any analysis or other information obtained from a state laboratory must be transmitted to the district attorney of the county in which the public defender or court appointed counsel is located [CAL. PENAL CODE §11050.5(c)]. The state bar originally recommended that this provision be deleted from the new law arguing that it exposed attorneys who used the privilege to charges of

violating their clients confidentiality and subjected them to possible malpractice actions [See CAL. BUS. & PROF. CODE §6068(e); STATE BAR OF CALIFORNIA 1975 CONFERENCE RESOLUTION 1-36]. Nevertheless, the legislature rejected this recommendation by retaining such language and also declaring that in the event the requirement of transmitting information to the district attorney is held to be invalid, Section 11050.5(b), which grants crime laboratory privileges to court appointed counsel *and* public defenders, will become inoperative [CAL. PENAL CODE §11050.5(c)].

See Generally:

- 1) B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE *Introduction* §8 (Bureau of Criminal Identification and Investigation) (Supp. 1975).
- 2) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 282-83 (laboratory and technical assistance) (1975).

Criminal Procedure; forfeiture of property

Health and Safety Code §11499 (new); §§11470, 11491.7, 11492, 11493 (amended).

SB 386 (Deukmejian); STATS 1977, Ch 771

Support: California Attorney General

In response to an apparent oversight in prior legislation [See CAL. STATS. 1976, c. 1407, §1, at—], the legislature has enacted Chapter 771 to extend forfeiture penalties to persons who allow others to use their vehicles to transport controlled substances [CAL. HEALTH & SAFETY CODE §11470(e)]. Formerly, a boat, airplane, or any other vehicle, was subject to forfeiture pursuant to Section 11470 of the Health and Safety Code only if the state could prove that the *owner* had knowingly used such a vehicle for the purpose of unlawfully transporting controlled substances [See CAL. STATS. 1976, c. 1407, §12, at—]. At the forfeiture hearing, the state had the burden of establishing by a preponderance of the evidence that such an owner had knowledge that the vehicle was used for illegal purposes [CAL. STATS. 1976, c. 1407, §11, at—; see CAL. EVID. CODE §115]. The court or jury, however, had to find that the owner's vehicle, boat or airplane was not used to illegally transport controlled substances before such vehicle was released to the owner [See CAL. STATS. 1976, c. 1407, §13, at—]. In addition, if the court or jury found against the owner, persons holding a security or other interest in the vehicle could previously avoid forfeiture of the interest only if they could prove that they had no knowledge of the illegal use of the vehicle when they acquired the interest [See CAL. STATS. 1976, c. 1407, §§12, 13, at—; CAL. EVID. CODE §115].

Chapter 771 has amended Section 11470 of the Health and Safety Code to provide that a vehicle used to unlawfully transport controlled substances is now subject to forfeiture if either the owner *or* some other defendant is

arrested and convicted in connection with such a crime [CAL. HEALTH & SAFETY CODE §11470(e)]. Furthermore, to affect title or interest in a vehicle the state now has the burden of establishing *beyond a reasonable doubt* at a forfeiture hearing that either the owner or interest holder in a vehicle that was used to illegally transport controlled substances, consented to the use of the vehicle with knowledge that it would be used for such illegal purposes [CAL. HEALTH & SAFETY CODE §§11491.7, 11492]. Consistent with this concept of placing an increased burden of proof on the state, Chapter 771 also specifies that any vehicle confiscated must be released to the person entitled *unless* a court or jury specifically finds that the vehicle was used in the illegal transportation of illicit substances [CAL. HEALTH & SAFETY CODE §11493]. If a court or jury finds, however, that the vehicle was used for such illegal purposes, but does not find that the person holding a lien, mortgage, security interest, or interest under a conditional sales contract on the vehicle acquired this interest with knowledge of the intended use, then the vehicle, boat, or airplane must either be directly released to the security interest holder or released upon payment of the owner's equity if the amount owed to the interest holder is less than the appraised value of the vehicle [See CAL. HEALTH & SAFETY CODE §11493]. Finally, Chapter 771 has added Section 11499 to the Health and Safety Code to declare the legislature's intent that nothing contained in Sections 11470 through 11499 should be construed to change or extend existing case law relating to search and seizure. In summary, Chapter 771 extends the penalty of forfeiture of a vehicle used in the illegal transportation of controlled substances to those cases in which the vehicle was operated by a person other than the owner, but declares that the state must now prove beyond a reasonable doubt that the owner consented to such use with knowledge of the intended illegal use before any forfeiture may be imposed.

See Generally:

- 1) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 312 (forfeiture of property used to unlawfully transport controlled substances) (1977).

Criminal Procedure; petit theft—prior conviction

Penal Code §666 (amended).

AB 1150 (Cordova); STATS 1977, Ch 296

(Effective July 8, 1977)

Support: California Peace Officers' Association

Opposition: California Attorneys for Criminal Justice

Chapter 296 amends Penal Code Section 666 to provide that a person convicted of petit theft who has previously been convicted of and incarcerated for petit theft, grand theft, burglary or robbery is now subject to

imprisonment in the county jail for not more than one year or in the state prison. Imprisonment in the state prison would be for a period of sixteen months, two years, or three years [CAL. PENAL CODE §18]. By contrast a person *without* prior convictions is subject to confinement for six months in the county jail and/or a fine of up to \$1,000 upon conviction of petit theft [CAL. PENAL CODE §490].

Prior to July 1, 1977, the effective date of the Uniform Determinate Sentencing Act, conviction for petit theft subsequent to a conviction for *any* felony or petit theft was punishable as either a felony or a misdemeanor [Compare CAL. PENAL CODE §17 with CAL. STATS. 1957, c. 1284, §1, at 2607]. The Uniform Determinate Sentencing Act, however, provided that conviction for petit theft would be punishable as a felony-misdemeanor only if the prior conviction was for petit theft or petit larceny [CAL. STATS. 1976, c. 1139, §266, at —]. Therefore, under the Uniform Determinate Sentencing Act, a person convicted of petit theft who had a previous misdemeanor conviction for the same offense, was subject to greater punishment than a person with a previous felony conviction for some other offense [Compare CAL. PENAL CODE §490 with CAL. STATS. 1976, c. 1139, §266, at —]. Chapter 296 now subjects those with prior burglary or theft-related convictions to possible felony punishment for any subsequent petit theft convictions, and thus, would appear to resolve this prior incongruity in the law. It is interesting to note, however, that burglary, though commonly associated with theft, is not necessarily theft-related since it is defined as entering various specified places with the intent to commit *any* felony [See CAL. PENAL CODE §459]. In addition, Chapter 296 also deletes from Section 666 the redundant reference to “petit larceny” [Compare CAL. STATS. 1957, c. 1284, §1, at 2607 with CAL. PENAL CODE §666]. “Theft” is a statutory term that includes the offense formerly called “larceny” [See B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Property*, §365 (1963)], and “larceny” in California statutes must be read as “theft” [CAL. PENAL CODE §490a]. Thus, Chapter 296, in an attempt to supplement the Uniform Determinate Sentencing Act [CAL. STATS. 1977, c. 296, §3, at —], clarifies the punishment for persons convicted of petit theft who have prior burglary or theft-related convictions by subjecting such persons to the increased punishment of a felony-misdemeanor.

See Generally:

- 1) 9 PAC. L.J., REVIEW OF SELECTED 1977 CALIFORNIA LEGISLATION 469 (determinate sentencing) (1978).
- 2) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 282 (Uniform Determinate Sentencing Act) (1977).